89-7024

(2)

No. 89-

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1989

WARREN McCLESKEY,

Petitioner,

v.

WALTER D. ZANT, Superintendent,
Georgia Diagnostic & Classification
Center,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Supreme Court, U.S.
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QUESTIONS PRESENTED

1. Should a State, which has been proven (i) to have committed a constitutional violation in a criminal case and (ii) to have deliberately hidden that violation for ten years through a pattern of secrecy and deception, be permitted to assert "abuse of the writ" as a defense to a second federal habeas application -- on the ground that the applicant should have discovered the State's misconduct, and its deliberate cover-up, sooner?

2. Should a habeas applicant be deemed to have "deliberately abandoned" a constitutional claim of State misconduct when, after a "reasonably competent" investigation, he was unable to uncover facts either proving the misconduct or revealing the conspiracy by which the State misconduct was being hidden?

3. Should a Court of Appeals, in determining whether a State's constitutional violation was harmless error, be permitted under Rule 52(a) to disregard the express findings of fact, on the harmless error issue, that were made by the District Court below?

4. Should a Court of Appeals, in determining whether a State's constitutional violation was harmless error, be permitted to disregard the District Court's ultimate conclusion on that mixed question of fact and law?

5. Can the State's introduction of an unconstitutionally obtained confession -- which was the only item of direct testimony, by an apparently impartial witness, identifying the defendant as the triggerperson in a homicide -- be deemed harmless constitutional error, both as to guilt and as to penalty, in a capital case?

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v.

WALTER D. ZANT, Superintendent, Georgia Diagnostic & Classification Center,

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Petitioner Warren McCleskey respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

CITATIONS TO OPINIONS BELOW

The District Court originally entered a judgment in petitioner's favor on February 1, 1984; that opinion is officially reported at 580 F. Supp. 338 (N.D. Ga. 1984). The Court of Appeals, sitting en banc, reversed the judgment of the District Court and denied relief on January 29, 1985; that opinion is officially reported at 753 F.2d 877 (11th Cir. 1987) (en banc). This Court entered a judgment on April 22, 1987,

affirming the Court of Appeals; that opinion is officially reported at 481 U.S. 279 (1987).

The District Court, on a second federal application, entered a judgment on January 15, 1988, nunc pro tunc for December 23, 1987, granting relief to petitioner; that opinion, which is not officially reported, is annexed as Appendix A. On January 6, 1989, the District Court entered an order denying respondent's motion under Rule 60(b); that opinion, which is not officially reported, is annexed as Appendix B. A panel of the Court of Appeals reversed the judgment of the District Court and denied relief on November 22, 1989; that opinion, which is officially reported at 890 F.2d 342 (11th Cir. 1989), is annexed as Appendix C.

JURISDICTION

The judgment of the Court of Appeals was entered on November 22, 1989, as amended on December 13, 1989. A timely petition for rehearing and rehearing en banc was denied on February 6, 1990. A copy of the order denying rehearing is annexed as Appendix D. The Court of Appeals stayed its mandate to and including March 23, 1990, pending the timely filing of a petition for certiorari; a copy of that order is annexed as Appendix E. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

This case involves 28 U.S.C. § 2244 (b), which provides in pertinent part:

> When after an evidentiary hearing on the merits of a material factual issue, or after a hearing on the merits of an issue of law, a person in custody pursuant to the judgment of a State court has been denied by a court of the United States . . . release from custody or other remedy on an application for a writ of habeas corpus, a subsequent application for a writ of habeas corpus in behalf of such person need not be entertained by a court of the United States . . . unless the application alleges and is predicated on a factual or other ground not adjudicated on the hearing of the earlier application for the writ, and unless the court . . . is satisfied that the applicant has not on the earlier application deliberately withheld the newly asserted ground or otherwise abused the writ.

This case also involves Rule 9 (b) of the Rules Governing Section 2254 Cases in the United States District Courts, which provides:

> Successive petitions. A second or successive petition may be dismissed if the judge finds that it fails to allege new or different grounds for relief and the prior determination was on the merits or, if new and different grounds are alleged, the judge finds that the failure of the petitioner to assert those grounds in a prior petition constituted an abuse of the writ.

STATEMENT OF THE CASE

I. Statement Of Facts

A. The Police Misconduct -- A Violation of Massiah

At the heart of this appeal lies evidence of a successful scheme by State officials to procure an illegal "confession." According to the express findings of the District Court, one or more officers of the Atlanta, Georgia, Bureau of Police Services entered into a conspiracy with a known jailhouse informant, Offie Evans, to secure a confession from Mr. McCleskey. The purpose of

the police conspiracy was to identify which of four robbers had shot a fellow police officer, Frank Schlatt, as he entered a furniture store during the course of a robbery. The conspiracy violated McCleskey's Sixth Amendment right to counsel.

The facts substantiating this conspiracy are not seriously at issue on this appeal. The District Court, after three days of evidentiary hearings, expressly found that Captain Ulysses Worthy, a supervisory officer at the Fulton County Jail in Atlanta, Georgia, was, by chance, present during the jailhouse meeting between several Atlanta police detectives and a pretrial detainee, Offie Evans, at which the conspiracy was born. The detectives were investigating the death of Atlanta police officer Frank Schlatt. They met with inmate Evans in Captain Worthy's office at the Fulton County Jail to discuss the role of Warren McCleskey in that crime. McCleskey was also in the Fulton County Jail awaiting trial for Schlatt's murder. (App. A, at 15-17).

The District Court found that, during this meeting, one of the detectives turned to Captain Worthy and asked him to move inmate Evans from another part of the jail to a cell adjacent to McCleskey's

> for the purpose of gathering incriminating information; [inmate] Evans was probably coached in how to approach McCleskey and given critical facts unknown to the general public. [Following the move,] Evans engaged McCleskey in conversations and eavesdropped on McCleskey's conversations with [co-indictee Bernard] Dupree; and Evans reported what he had heard . . . to Assistant District Attorney Parker on July 12 [1978].

(App. A. at 23).

These findings are strongly supported by the record evidence from the federal habeas corpus proceeding. Captain Worthy twice testified about his presence at the meeting between Atlanta police detectives and inmate Evans. (R5-148). Worthy recalled that, during the meeting, Detective Sidney Dorsey (or perhaps some other "officer on the case") "asked Mr. Evans to engage in conversations with McCleskey who was being held in the jail." (R5-150). During the federal hearing, the District Court directly questioned Captain Worthy on the essential points:

> THE COURT: But you're satisfied that those three things happened, that they asked to have him put next to McCleskey, that they asked him to overhear McCleskey, and that they asked him to question McCleskey.
>
> THE WITNESS: I was asked can -- to be placed near McCleskey's cell, I was asked.
>
> THE COURT: And you're satisfied that Evans was asked to overhear McCleskey talk about this case?
>
> THE WITNESS: Yes, sir.
>
> THE COURT: And that he was asked to kind of try to draw him out a little bit about it?
>
> THE WITNESS: Get some information from him.

(R6- 64-65; accord, R6- 26-28).

Captain Worthy's testimony was independently confirmed and buttressed by a remarkable 21-page written statement which had been given by inmate Evans to Atlanta police officials in July of 1978, shortly after the initial meeting between Evans and the detectives. In the typewritten statement, Evans described in detail how he began to question McCleskey about the crime. He

bragged that, once in the adjacent cell, he (i) adopted a false name, (ii) claimed a close relationship with McCleskey's co-defendant, Ben Wright, (iii) lied about his own near-involvement in the crime, (iv) spoke to McCleskey about details of the crime which had not been made public and which were known only to Atlanta police and to the participants, (v) established himself with McCleskey as a reliable "insider," and then (vi) began systematically to press McCleskey for information about the crime.[1]

This evidence obtained by inmate Evans from McCleskey later became a centerpiece of the State's case during McCleskey's trial. Indeed, the State used Evans' testimony to establish three important points: (i) that Evans heard McCleskey confess

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[1] In his statement, inmate Evans bragged about his duplicity in dealing with Mr. McCleskey:

"I told Warren McClesky [sic] 'I got a nephew man, he in a world of trouble ...' McClesky asked me 'What is his name.' I told him 'Ben Wright.' McClesky said 'You Beens' [sic] uncle.' I said 'Yeah.' He said 'What's your name?' I told him that my name was Charles." (Fed. Exh. 8, at 3). After Evans falsely assured McCleskey that he "used to stick up with Ben," and that "Ben told me that you shot the man yourself," (id. at 4), Evans began to pry open the story of the crime. "I said man 'just what's happened over there?'" (Id.)

Even after McCleskey told him some details of the crime, Evans continued his surreptitious interrogation: "And then I asked McClesky what kind of evidence did they have on him." (Id. at 6). In a subsequent conversation, Evans sought to learn the location of the missing murder weapon: "Then I said, 'They ain't got no guns or nothing man?'" (Id. at 7). When Bernard Dupree, Mr. McCleskey's co-defendant, overheard the conversations between Evans and McCleskey from his cell upstairs and became apprehensive, Evans worked to allay Dupree's suspicions, "talking to Dupree about Reidsville [and] just about ma[king] Dupree know me himself." (Id. at 9).

to shooting police officer Schlatt (Tr. T. 870-871; Fed. Exh. 4, 870-871); (ii) that McCleskey told Evans ". . . he would have tried to shoot his way out . . . if it had been a dozen" police officers (Tr. T. 871; Fed. Exh. 4, 871);[2] and (iii) that McCleskey had explained to Evans what later became a glaring inconsistency in the identification testimony of another principal State's witness.[3]

Based on the testimony of Captain Worthy and on the 21-page statement of Offie Evans, the District Court concluded that

> petitioner's sixth amendment rights, as interpreted in Massiah, were violated by the use at trial of Evans' testimony about the petitioner's incriminating statements because those statements were deliberately elicited by an agent of the state after petitioner's indictment and in the absence of petitioner's attorney.

(App. A, at 30).[4]

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[2] This ostensible statement subsequently became a basis for the prosecutor's argument to the jury that Mr. McCleskey had acted with "malice." (See Tr. T. 974).

[3] According to inmate Evans, McCleskey had confessed during their jailhouse conversations that he had been wearing makeup and a disguise on the day of the crime (Tr. T. 301-303; 870-871; 876-879). This fact, if true, explained serious discrepancies in the eyewitness account of the robbers given by one witness.

[4] Although the specific misconduct of which the State was found liable here -- placing an informant in a cell and instructing him to interrogate a defendant surreptitiously -- may be argued to be an extension of the basic principle announced of Massiah v. United States, 377 U.S. 201 (1964), this Court clearly applied Massiah to forbid such jailhouse interrogations in United States v. Henry, 447 U. S. 264 (1980). At the time Henry was decided, on June 16, 1980, petitioner McCleskey was still pursuing his direct appeal, which did not become final until his petition for certiorari was denied by this Court on October 6, 1980. See McCleskey v. Georgia, 449 U.S. 891 (1980) (denying certiorari). Petitioner's subsequent assertion of this claim in collateral proceedings thus presents no "new law" problem under Teague v. Lane, __U.S.__, 103 L. Ed.2d 334 (1989) or its progeny.

B. The Issue Of Abuse Of The Writ

The Court of Appeals never reached the merits of petitioner's claim under Massiah v. United States, 377 U.S. 201 (1964). Instead, it held that petitioner had abused the writ of habeas corpus by failing to include a Massiah claim in his initial federal habeas petition. (App. C, 890 F.2d at 344).[5] Consequently, it is necessary to set forth the circumstances under which the Massiah violation first came to light.

1. The State's Failure To Produce Written Statements

a. The Efforts of Trial Counsel

Despite repeated efforts by Warren McCleskey's trial counsel to obtain any evidence that might reflect illegal State contact, the State failed to turn over Offie Evans' 21-page statement, or even to acknowledge that it existed. Prior to trial, McCleskey's defense attorney filed a written motion seeking all written or oral statements made by McCleskey to anyone, and all exculpatory evidence. After an in camera inspection, the trial court allowed the State to withhold both (i) the 21-page statement made by informant Evans and (ii) even the fact that the State possessed such a statement. (R1-1, Exh. M; R4-73-81; R6-118).

See, Penry v. Lynaugh, __U.S.__, 106 L.Ed.2d 256, 267-268 (1989) (habeas applicant is entitled to the benefit of changes in law that occur prior to denial of certiorari from direct appeal of conviction)

[5] The Court of Appeals also held that the State's Massiah violation was harmless beyond a reasonable doubt. The facts relevant to that claim will be set forth in ¶ C infra.

During mid-trial, defense counsel orally moved for the right to examine all documents in the State's possession that reflected any statements made by McCleskey. (R1-1, Exh. O, 830-832; see Fed. Exh. 6). The motion was denied; in so doing, the trial court inexplicably furthered the suggestion that the State possessed no undisclosed, written statements at all. (Judge: "I don't know that we are talking about any written statements.") (Id.)(emphasis added).

Defense counsel nonetheless decided to preserve this issue on appeal. The Georgia Supreme Court, however, apparently unwittingly, contributed to these developments by denying all relief, remarking that "[t]he evidence [that the defense counsel] sought to inspect was introduced to the jury in its entirety." McCleskey v. State, 245 Ga. 108, 263 S.E.2d 146, 150 (1980)(emphasis added). In sum, both the trial court and the Georgia Supreme Court left the unmistakable impression that the State had no written statements that had not been turned over to the defense. Defense counsel subsequently testified that he "was never given any indication that [any undisclosed] statement existed." (St Hab. Tr. 77).

b. The Efforts of Habeas Counsel

The State continued to stonewall Warren McCleskey's counsel about the existence of the 21-page statement throughout state habeas proceedings. At the outset of those proceedings in 1981, present counsel entered the case as volunteers on McCleskey's behalf. Although they gleaned from the trial record that the

State apparently possessed no written statements from McCleskey, and although they lacked anything more than an unsubstantiated suspicion of a Massiah violation, they nonetheless decided, as a precaution, to include a Massiah claim along with twenty-two other constitutional challenges asserted in McCleskey's state petition.

Attorney Robert Stroup followed up the Massiah claim with an extensive investigation designed to uncover any facts that might support it. He first met with members of the Atlanta police force (whom he had represented in unrelated Title VII cases) for advice on the best way to uncover any available evidence of an illegal, jailhouse informant relationship. (R4 31-32). Armed with their advice, he then interviewed a number of key jailors at the Fulton County Jail. (R4 33). None of these jail officials knew anything about a surreptitious police informant in McCleskey's case.

Attorney Stroup nonetheless persevered, tracking down a former jail official, Bobby Edwards, who had been in charge of all inmate cell placements at the time McCleskey had been incarcerated. By 1981, Mr. Edwards had retired and was living over 60 miles from Atlanta; Stroup managed to find and interview him. Edwards had no knowledge suggesting evidence to support the claim of illegal misconduct.[6]

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[6] At the time, the Fulton County Jail was staffed by several shifts of jailors (R6 76); the total cell population was between 900-1700; each shift was staffed by literally scores of officers. (R6 73). Mr. Stroup admittedly did not personally interview each of the several hundred jailors, some of them

Stroup then directly sought, during discovery in the state habeas action, the prosecutor's file in the case. He was sent a mass of documents from a Georgia Assistant Attorney General, accompanied by a letter assuring Stroup that he was receiving "a complete copy of the prosecutor's file resulting from the criminal prosecution of Warren McCleskey." (Fed. Exh. 7) (emphasis added). Informant Evans' crucial 21-page statement was not included among the documents transmitted.[7] At no time, either at that point or later, did lawyers for the District Attorney or for the Georgia Attorney General's office ever turn over Evans' 21-page account of his undercover interrogation of Warren McCleskey.

To complete his investigation, Mr. Stroup questioned inmate Offie Evans under oath during state habeas proceedings and deposed the Assistant District Attorney who had prosecuted McCleskey. The prosecutor gave no hint that the State's relationship with its key witness, Offie Evans, might have been improper:

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retired by 1981, who had been employed by the Fulton County Jail in 1978. He confined his investigations on this claim -- one of 22 separate constitutional issues which he, a pro bono volunteer attorney was then pursuing -- to interviews with the employees identified as most likely to have relevant information. None of those officers knew of any evidence suggesting that a Massiah violation might have occurred.

[7] Mr. Stroup has subsequently testified that, in reliance on these written representations of the State of Georgia, it simply did not occur to him that this representation was false, that a written statement existed, and that he was being misled. (R1- 7-10). The District Court credited Mr. Stroup's testimony on this point. (R1- 118-119; R3-- 22-25).

> Q. [Mr. Stroup]: Okay. Were you aware at the time of the trial of any understandings between Evans and any Atlanta police department detectives regarding favorable recommendation [sic] to be made on his federal escape charge if he would cooperate with this matter?
>
> A. [Assistant District Attorney]: No, sir.
>
> Q. Let me ask the question another way to make sure we are clear. Are you today aware of any understanding between any Atlanta police department detectives and Offie Evans?
>
> A. No, sir, I'm not aware of any.

(Fed. Exh. 3, 9-10).

On cross-examination, the Assistant District Attorney broadened his testimony:

> Q. Do you have any knowledge that Mr. Evans was working as an informant for the Atlanta Police or any police authorities when he was placed in the Fulton County Jail and when he overheard these conversations of Mr. McCleskey?
>
> A. I don't know of any instance that Offie Evans had worked for the Atlanta Police Department as an informant prior to his overhearing conversations at the Fulton County Jail.

(Fed. Exh. 3, 14-15).

Mr. Stroup subsequently testified that, following McCleskey's state habeas proceedings, he concluded that the Massiah claim could not be substantiated:

> ... I looked at what we had been able to develop in support of the claim factually in the state habeas proceeding and made the judgment that we didn't have the facts to support the claim and, therefore, did not bring it into federal court.

(R4- 44).

2. The Discovery Of The State's Cover-up

Offie Evans's 21-page statement did not come to light until June of 1987 -- six years after Mr. McCleskey's initial federal habeas petition had been filed. Its existence was revealed only following a fortuitous development in an unrelated Georgia case.[8] Once the statement was in petitioner McCleskey's possession, however, he acted immediately to make it the centerpiece of a Massiah claim which he included in his second federal petition filed in July of 1987. (See R1-9 & Exh. E).

Even in the face of the written statement, State officials continued to deny any illegal activity. During federal hearing on his second petition, McCleskey's attorneys sought to develop all the circumstances under which the statement had initially been taken. In response to an inquiry about where the statement had been taken, one of the police officers, Detective Welcome Harris, mentioned "a room [at the Fulton County Jail] that was occupied by a captain, and I don't think -- he's no longer employed out there, I think his name is Worthy." (R4 195).

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[8] In that case, Napper v. Georgia Television Co., 257 Ga. 156, 356 S.E.2d 640 (1987), the Supreme Court of Georgia appeared to hold, for the first time, that police investigative files would be deemed within the compass of the Georgia Open Records Act, O.C.G.A. § 50-18-72(a) for purposes of disclosure during habeas corpus proceedings in that case. Mr. Stroup immediately cited that then-recent decision, still pending before the Georgia Supreme Court on rehearing, in support of a request directly to the Atlanta Bureau of Police Services, seeking the original police files in McCleskey's case. (R1-7-6). Because Napper was still pending on rehearing, attorneys for the Atlanta Bureau were reluctant to disclose the entire police file, but on June 10, 1987, they agreed to provide Mr. Stroup with one document--which proved to be the 21-page statement made by Offie Evans. (R1-7-7).

Asked whether Captain Worthy had been present during the interview, Detective Harris replied, "No, sir. I'm sure he wasn't, you know." (R4 196).

Although the police suggested that Captain Worthy had not been present for the interview, and although he had long been retired from service at the jail, McCleskey's attorneys nonetheless sought to locate and subpoena him to appear during the waning hours of McCleskey's 1987 federal hearing -- one of many subpoenas issued to those whose names were first mentioned during the course of the two-day federal hearings. (R4-21).

Mr. Worthy's appearance and his testimony, outlined above, came as a complete surprise to McCleskey's attorneys, to the Attorney General, and to everyone else present at the hearing (see R5 166) -- except, no doubt, those who were active parties in the Massiah violation and in the State's subsequent ten-year cover-up.

3. The District Court's Findings On Abuse

After receiving documentary evidence and hearing live testimony, the District Court made comprehensive findings on the issue of abuse of the writ. The Court first considered the State's defense of deliberate abandonment:

> [P]etitioner cannot be said to have intentionally abandoned this claim. Although petitioner did raise a Massiah claim in his first state petition, that claim was dropped because it was obvious that it could not succeed given the then-known facts. . . Abandoning a claim whose supporting facts only later become evident is not an abandonment that "for strategic, tactical, or any other reasons . . . can fairly be described as the deliberate by-passing of state procedures." Fay v. Noia, 372 U. S. 391, 439 (1963), quoted in Potts v. Zant, 638 F.2d 727, 743 (5th Cir. 1981). . . . This is not a case where petitioner has reserved his proof or deliberately withheld his claim for a second petition. Sanders v. United States, 373 U.S. 1, 18 (1963).

(R4 118-119). Turning to the issue of "inexcusable neglect," the Court observed that

> there is . . . no inexcusable neglect unless "reasonably competent counsel" would have discovered the evidence prior to the first federal petition. This court [has] concluded . . . that counsel's failure to discover Evans' written statement was not inexcusable neglect. [R4-118-119]. The same is true of counsel's failure to discover Worthy's testimony. . . [C]ounsel did conduct an investigation of a possible Massiah claim prior to the first federal petition, including interviewing "two or three jailers." . . . The state has made no showing of any reason that petitioner or his counsel should have known to interview Worthy specifically with regard to the Massiah claim.

(R3-22- 24-25).

C. The Issue Of Harmless Error

1. The State's Evidence At Trial

Officer Frank Schlatt was shot as he entered the Dixie Furniture Company on May 13, 1978 in response to a silent alarm indicating that a robbery was in progress. There were no eyewitnesses to the shooting of Officer Schlatt, although a number of witnesses identified four robbers, including Warren McCleskey, as those present in the store.

Petitioner McCleskey initially entered the furniture store from the front while his three co-defendants entered from the rear. The four robbers, however, herded all the employees to several offices in the rear half of the store and forced them to lie face-down on the floor while they carried out the robbery.

These plans were well underway when Officer Frank Schlatt entered the furniture store by the front door.

No employee was able to testify which of the four co-defendants fired the shots that killed Officer Schlatt. The State offered two other witnesses, however, who told the jury that Warren McCleskey had confessed to the shooting. One was Ben Wright, McCleskey's co-defendant. Wright had been a leader in planning and carrying out the robbery; he had directed the other participants (e.g., Tr. T. 651, 657); and he was a highly likely suspect in the shooting. Wright acknowledged during his trial testimony that the State intended to recommend 20-year concurrent sentences for his part in the murder and armed robbery in exchange for his testimony against Warren McCleskey. (Tr. T. 646-647; 682-683.). The District Court found that his testimony "was obviously impeachable." (App. A, at 30.)

Just before it retired to deliberate on guilt or innocence, however, the jury heard another witness, an apparently neutral third party who told the jury of McCleskey's ostensible jailhouse confession: that witness was Offie Evans.

Apart from Wright and Evans, the State's case rested largely upon circumstantial evidence in an effort to place the murder weapon in McCleskey's hand. Both co-defendant Ben Wright and Wright's girlfriend testified that, on the day of the crime, McCleskey had been carrying a pearl-handled, silver .38 pistol linked to the homicide. (Tr. T. 649; 727). Yet on cross-examination, Wright admitted that he, not McCleskey, had

personally carried the .38 pistol for weeks at a time prior to the crime. (Tr. T. 682). Moreover, Wright's girlfriend admitted under cross-examination that she had informed police, on the day Wright was arrested, that it was Wright, not McCleskey, who had been carrying the .38 pistol on the day of the furniture store robbery. (Tr. T. 607; 631-634).[9]

2. The Jury's Verdict: Malice Murder

At the close of the guilt phase, the Superior Court instructed the jury on theories of malice murder (Tr. T. 998-999) and of felony murder. (Tr. T. 999-1000). In its charge on malice murder, the trial court instructed the jury that "a person commits murder when he unlawfully and with malice aforethought, either express or implied, causes the death of another human being." (Tr. T. 1000). In its charge on felony murder, the trial court informed the jury that "[t]he homicide is committed in the

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[9] The panel, both in its initial description of the crime (App. C, 890 F.2d at 344) and its analysis of the harmless error issue (id. at 352), overlooked or disregarded these record facts, drawn directly from the trial transcript. It drew its view of the facts, instead, from a summary of the crime contained in the 1980 opinion of the Supreme Court of Georgia on Mr. McCleskey's direct appeal. That opinion had been written seven years prior to the District Court's factfindings, at a time when no Massiah challenge was before that or any court. Its summary statement of facts did not, of course, preclude the more careful findings made years later by the District Court on McCleskey's Massiah claim, after a full federal hearing, at a time when the significance of the State's circumstantial case, weighed against its other evidence, had come plainly into view. See, e.g., Townsend v. Sain, 372 U.S. 291, 316 (1963); Magwood v. Smith, 791 F.2d 1438, 1448-1450 (11th Cir. 1986); Green v. Zant, 715 F.2d 551,557-558 (11th Cir. 1983); cf. Harris v. Oliver, 645 F.2d 327 (5th Cir. Unit B 1981) (state findings need not be accepted when not anchored in proper legal standard).

perpetration of a felony when it is committed by the accused while he is engaged in the performance of an act required for the full execution of such a felony." (Tr. T. 1000) (emphasis added), and that the jury should convict "if you believe and find beyond a reasonable doubt that the homicide alleged in this indictment was caused by the defendant while he, the said accused, was in the commission of an armed robbery . . . ." (Id.).[10]

During its deliberations, the jury sought further instructions on the issue of malice murder. The Superior Court repeated its instructions. (Tr. T. 1007-1009). Ten minutes later, the jury returned, finding Mr. McCleskey guilty of malice murder and two counts of armed robbery. (Tr. T. 1010).

3. The District Court's Finding On Harmless Error

The District Court, after reviewing the trial record, concluded that Offie Evans' "testimony about petitioner's incriminating statements was critical to the state's case," and that the admission of Evans' testimony could not be deemed harmless:

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[10] The court had earlier charged the jury, in a general section, on the doctrine of "parties to a crime," as follows:

> That statute says that every person concerned in the commission of a crime is a party thereto and may be charged with and convicted of commission of the crime, and then it has several subsections. It says that a person is concerned in the commission of a crime only if he directly commits the crime, intentionally aides or abets in the commission of the crime, or intentionally advises, encourages, hires, counsels or procures another to commit the crime.

(Tr. T. 994).

> There were no witnesses to the shooting and the murder weapon was never found. The bulk of the state's case against the petitioner was three pronged: (1) evidence that petitioner carried a particular gun on the day of the robbery that most likely fired the fatal bullets; (2) testimony by co-defendant Ben Wright that petitioner pulled the trigger; and (3) Evans' testimony about petitioner's incriminating statements. As petitioner points out, the evidence on petitioner's possession of the gun in question was conflicting and the testimony of Ben Wright was obviously impeachable. . . . Because the court cannot say, beyond a reasonable doubt, that the jury would have convicted petitioner without Evans' testimony about petitioner's incriminating statements, petitioner's conviction for the murder of Officer Schlatt must be reversed pending a new trial.

(App. A, at 29-31).

D. The Holding of the Panel

1. Abuse Of The Writ

The panel decided this appeal on the express assumption "that McCleskey was unaware of both [the 21-page statement and Captain Worthy]" when he filed his initial petition. The critical legal question, from the panel's perspective, was "whether McCleskey's unawareness of the factual bases for his Massiah claim at the time of his first federal habeas petition is sufficient to justify his failure to present the claim." (App. C, 890 F.2d at 348).

In answering that question, the panel faulted the District Court for "misconstru[ing] the meaning of deliberate abandonment." (Id. at 349). Since Mr. McCleskey's attorneys had been aware of the legal issue, (id.), the panel reasoned, it was appropriate to impute to them some unspecified knowledge of the facts as well. The panel concluded that counsels' decision not

to go forward with the Massiah claim into federal court "constitutes prima facie evidence of deliberate abandonment." (Id).

> [W]e must assume that at the time McCleskey filed his first state habeas petition, counsel had determined that there was some factual basis for a Massiah claim. Indeed, such a determination is not surprising. Not only was counsel aware that Evans was in a cell next to McCleskey, but counsel was also aware that some sort of relationship existed between Evans and the police, as this formed the basis of McCleskey's Giglio claim.[11] The petitioner and his counsel did not accidentally fail to include the Massiah claim in the federal petition, but made a knowing choice not to pursue the claim after having raised it previously. This constitutes prima facie evidence of deliberate abandonment.

(App. C, 890 F.2d at 349).

The panel acknowledged that petitioner's attorneys had made unsuccessful efforts to locate concrete evidence of a Massiah violation. The panel faulted those efforts as "somewhat lacking."

> A petitioner and his counsel may not circumvent the abuse of the writ doctrine by failing to follow through with an investigation and then later asserting that the claim could not have succeeded earlier on the facts as then known. It will only be possible to avoid piecemeal litigation if counsel is required to make a thorough investigation of the facts at the time of petitioner's first petition for habeas corpus.

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[11] Petitioner alleged during his initial state and federal habeas proceedings that Offie Evans had testified in exchange for promises of favorable State treatment. Evans had disavowed receiving such promises during his cross-examination at McCleskey's trial. The Court's opinion in Giglio v. United States, 405 U.S. 150 (1972) held that a witness's failure to reveal any such promise would violate the Due Process Clause of the Fourteenth Amendment.

(App. C, 890 F.2d at 350).[12]

In effect, the panel held that facts admittedly unknown to a petitioner would be attributed to him in assessing whether he had "deliberately abandoned" a claim, unless petitioner's counsel had conducted a "thorough investigation." The panel made no effort to reconcile this new standard with the District Court's express finding that counsel's investigation had been "reasonably

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[12] The panel mentioned that McCleskey's counsel had never interviewed the detectives ultimately implicated in the coverup or another jail official who testified during McCleskey's trial. (App. C, 890 F.2d at 349-350 n. 12). Yet the panel ignored both (I) the District Court's express finding that counsel's actions on this point were not inexcusable under all the circumstances, and (ii) its observation that the detectives' denial of all misconduct, under oath, during federal habeas proceedings, made it plain that "conducting such interviews would [not] have allowed petitioner to assert this claim any earlier." (App. A, at 22-25).

The panel likewise faulted petitioner for failing to "present[] any reason why counsel would have been unable to contact Ulysses Worthy back in 1981 when the first federal habeas petition was filed." (App. C, 890 F.2d at 350). Two reasons, however, were evident from the record. First, Worthy's name did not even surface until midway during the federal habeas hearing; even then, the police mentioned him only as a retired jail officer in whose office the 21-page statement had been taken--according to the police, in Worthy's absence. Second, the Fulton County Jail had been staffed by hundreds of jail employees in July of 1978; nothing linked Captain Worthy to the McCleskey case until testimony emerged that his office had been used to obtain the 21-page statement whose very existence had been hidden from petitioner's attorneys for 10 years.

Finally, the panel noted that petitioner had "not shown that a more extensive effort at that time to track down persons with information as to what transpired in the county jail during the summer of 1978 would not have turned up Worthy." (App. C, 890 F.2d at 350). The District Court, however, expressly found that reasonably competent counsel could not have been expected to uncover these other witnesses. (App. A, at 24-25).

competent," and that petitioner had not been guilty of inexcusable neglect under all the circumstances.

2. Harmless Error

The panel drew its view of the State's case neither from the trial transcript nor from the District Court's factfindings, but instead from a brief and inaccurate summary of the crime contained in a 1980 opinion by the Supreme Court of Georgia on McCleskey's direct appeal. In consequence, the panel fully credited a view (i) that McCleskey had entered the furniture store from the front, (App. C, 890 F.2d at 344); (ii) that "[t]he officer was killed by the man who entered and secured the front of the store while the other three men were in the back," (App. C, 890 F.2d at 352); (iii) that "McCleskey had a .38 caliber Rossi" pistol, (App. C, at 344), and (iv) that "the officer was killed by a bullet from a .38 caliber Rossi handgun." (App. C, at 352).

Relying on this "substantial amount of circumstantial evidence" (id.), the panel concluded that the

> evidence other than Evans' testimony presented in the case presents such clear indication of McCleskey's guilt, [that] this court finds beyond a reasonable doubt that the jury would have convicted and sentenced McCleskey as it did even without Evans' testimony.

(id. at 353).

REASONS FOR GRANTING THE WRIT

I.

THE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER A STATE MAY ASSERT THE DEFENSE OF "ABUSE OF THE WRIT," ON A SECOND FEDERAL HABEAS APPLICATION, AFTER IT HAS SUCCESSFULLY CONCEALED ITS OWN CONSTITUTIONAL VIOLATION FROM THE HABEAS APPLICANT DURING THE INITIAL FEDERAL APPLICATION

A. The State's Unclean Hands

This Court has traditionally insisted that, in criminal cases, the misconduct of any member of the prosecution team must be deemed state action and imputed to the State itself. See, e.g., Mooney v. Holohan, 294 U. S. 103 (1935); Brady v. United States, 373 U.S. 83 (1963). The good faith of some members of the State's team cannot excuse the bad faith of others, since, as Chief Justice Burger reasoned in Giglio v. United States,

> [t]he prosecutor's office is an entity and as such it is the spokesman for the Government. A promise made by one attorney must be attributed, for these purposes,. to the Government. See Restatement (Second) of Agency § 272. See also American Bar Association Project on Standards for Criminal Justice, Discovery and Procedure Before Trial § 2.1(d). To the extent this places a burden on the large prosecution offices, procedures and regulations can be established to carry that burden and to ensure communication of all relevant information on each case to every lawyer who deals with it.

405 U. S. 150, 154 (1972). Accord: Michigan v. Jackson, 475 U. S. 625, 634 (1986) ("Sixth Amendment principles require that we impute the State's knowledge from one state actor to another. For the Sixth Amendment concerns the confrontation between the Sate and the individual"); Santobello v. New York, 404 U.S. 257, (1971)(initial prosecutor's plea offer held binding on subsequent prosecutor); Cf. United States v. Bagley, 473 U. S. 667, 671 &

n.4 (1986) (conduct by state law enforcement agents working with federal investigators imputed to federal prosecutor's office) [13]

In this case, the District Court found as fact that Atlanta police detectives entered into a secret -- and flagrantly unconstitutional -- relationship with a jailhouse informant, Offie Evans, to secure damning evidence against petitioner Warren McCleskey. The conspiracy, known only to the police detectives, to the informant, and to one jailor, Captain Ulysses Worthy, was successfully hidden for more than a decade. Their misdeeds came to light only in July of 1987, a few days before Warren McCleskey's scheduled execution.

Ever since that time, the State -- now represented by the Attorney General -- has sought to distract attention from the merits of McCleskey's constitutional claim under Massiah, and to redirect the spotlight away from its own misconduct and toward the ostensible errors of petitioner's habeas counsel. The State's remarkable proposition is that they should receive a double reward for their agents' conspiracy: first, the initial

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[13] The lower federal courts have regularly applied this rule to police misconduct of the sort at issue here. See, e.g., Freeman v. State of Georgia, 599 F.2d 65, 69-70 (5th Cir. 1979) ("We feel that when an investigating police officer willfully and intentionally conceals material information, regardless of his motivation and the otherwise proper conduct of the state attorney, the policeman's conduct must be imputed to the state as part of the prosecution team"); Barbee v. Warden, 331 F.2d 842 (4th Cir. 1964) ("The police are also part of the prosecution, and the taint on the trial is no less if they, rather than the State's Attorney, were guilty of the nondisclosure. . . ."); Schneider v. Estelle, 552 F.2d 593 (5th Cir. 1971); Jackson v. Wainwright, 390 F.2d 288, 296 (5th Cir. 1968); Curran v. State of Delaware, 259 F.2d 707, 713 (3d Cir. 1958).

death sentence, won in significant measure through inmate Evans' testimony; and now, a successful "abuse of the writ" defense, won by charging McCleskey's attorneys with the failure to have uncovered the State's own misconduct earlier -- misconduct which was vigorously and deliberately suppressed, by State actors, through a decade of perjury and deceit. [14]

The Court recently confronted similar State misconduct, and faced a strikingly similar attempt by the State to avoid responsibility for its actions, in Amadeo v. Zant, __U.S.__, 100 L.Ed.2d 249 (1988). There, as here, a State actor had secretly violated the federal constitution -- a prosecutor had surreptitiously instructed jury commissioners on a scheme to evade federal jury composition standards. 100 L.Ed. 2d at 257. There, as here, incriminating evidence was theoretically available -- in Amadeo, a cryptic memo wedged in the jury commissioners' files, in McCleskey, a retired jailor, one of hundreds who had worked in the Fulton County Jail at the time. There, as here, the District Court found that the evidence had not been reasonably available to defense counsel. There, as here, once evidence of the misconduct came to light, the State insisted that the merits of the jury claim should not be heard,

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[14] No doubt, had petitioner McCleskey decided to carry his Massiah claim into federal court on his initial federal application, having failed to uncover any evidence to support the claim during his initial state habeas proceedings, respondent would have launched a vigorous professional attack against petitioner's counsel for making frivolous charges against the State despite a lack of factual support.

since the habeas applicant had not discovered the misconduct in time. 100 L.Ed.2d at 258.

There, as here, a District Court, after an evidentiary hearing, granted relief on the merits, finding as fact that the applicant's defense attorneys had not engaged in "'sandbagging' or 'deliberate bypass,'" 100 L.Ed.2d at 258 and that their conduct had been "reasonable . . . in light of all the circumstances." Id. at 259. There, as here, a panel of the Court of Appeals overturned the District Court's judgment--disregarding the District Court's findings of fact and concluding that the evidence of State misconduct had been "readily discoverable." 100 L.Ed.2d at 259.

The only difference between Amadeo and this case is their procedural posture. The issue in Amadeo was whether the State's misconduct constituted sufficient "cause" under Wainwright v. Sykes, 433 U. S. 72 (1977) to excuse the applicant's procedural default -- his failure to have asserted the claim at trial. 100 L.Ed.2d at 259-260. Responsive to this Court's teachings in Murray v. Carrier, 477 U. S. 478, 488 (1986), the District Court concluded that the clear evidence of "'some interference by [state] officials,'" constituted sufficient "cause" to excuse Amadeo's procedural default.

There is no defensible reason, however, why State misconduct uncovered after direct appeal but in time for presentation on an initial federal application, should be treated differently, under a "cause" and "prejudice" analysis,

from misconduct that the State has somehow managed to hide until after initial habeas proceedings are completed. If the State has deliberately withheld evidence of its own unconstitutional behavior, federal courts simply should not entertain a defense of laches or of abuse under Rule 9 (b). The very equitable foundations of the writ forbid any party from seeking relief if it comes to the federal courts with unclean hands.

Indeed, in Sanders v. United States, 373 U.S. 1 (1963), the Court began its analysis of successive petition jurisprudence with the proposition

> that 'habeas corpus has traditionally been regarded as governed by equitable principles. . . Among them is the principle that a suitor's conduct in relation to the matter at hand may disentitle him to the relief he seeks.

373 U.S. at 17-18. Pointing to inequitable conduct that would preclude a habeas applicant from obtaining relief, the Court mentioned cases in which "a prisoner deliberately withholds one of two grounds for federal collateral relief," or engages in "needless piecemeal litigation . . whose only purpose is to vex, harass, or delay." 373 U. S. at 18.

Here, the District Court carefully reviewed the behavior of petitioner and his counsel and found, as fact, that they had not engaged in such misconduct:

> [P]etitioner cannot be said to have intentionally abandoned this claim. . . Abandoning a claim whose supporting facts only later became evident is not an abandonment that "for strategic, tactical, or any other reasons . . . can fairly be described as the deliberate by-passing of state procedures." Fay v. Noia, 372 U. S. 391, 439 (1963). . . This is not a case where petitioner has reserved his proof or deliberately withheld his claim for a second petition. .

> . Second, petitioner's failure to raise this claim in his first federal habeas petition was not due to his inexcusable neglect. . . . Petitioner's counsel represents, and the state has not disputed, that counsel did conduct an investigation of a possible Massiah claim prior to the first federal petition. . . . The state has made no showing of any reason that petitioner or his counsel should have known to interview [Captain] Worthy specifically with regard to the Massiah claim. . . . Petitioner's failure to discover this evidence earlier was not due to inexcusable neglect.

(App. A, 24-26).

Yet the panel's opinion on appeal reads as if the State's underlying misconduct was utterly irrelevant, and the State's ensuing perjury and deceit, only some hide-and-seek game which the State won -- and Warren McCleskey lost. Blind both to the State's initial wrongdoing and to its ten-year cover-up, the panel embraced the State's "abuse of the writ" defense and focused solely on the ostensible deficiencies of McCleskey's counsel. By so doing, the panel ignored this Court's consistent teaching that states must be held accountable for their own deliberate misconduct in criminal cases.

Only by setting Mooney, Brady, Giglio, Michigan v. Jackson, Santobello, Bagley, and Amadeo v. Zant to one side could the panel's opinion be affirmed.

B. The Panel's Redefinition Of "Deliberate Abandonment"

Yet the panel's opinion did more than overlook the State's equitable disentitlement to assert an "abuse of the writ" defense. On the merits, the panel (i) redefined the basic meaning of the "deliberate abandonment" standard under Rule 9(b), and (ii) ignored the command of Rule 52.

To assess whether a habeas applicant has "deliberately abandoned" a claim, federal courts normally determine whether a petitioner made "an intentional relinquishment or abandonment of a known right or privilege," adhering to the classic terms of Johnson v. Zerbst, 304 U.S. 458, 464 (1938) (emphasis added).[15] The panel held, however, that even an applicant, like petitioner McCleskey, who admittedly had been denied access to the critical fact by the State, should be deemed to have "deliberately abandoned" a claim unless he has engaged in a "thorough investigation" of the facts.[16]

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15 Perhaps the most definitive case applying Zerbst to successive petitions is Price v. Johnston, 334 U.S. 266 (1948). There, the Court limited federal courts' power to dismiss a second petition to instances in which a petitioner had full access to "proof [of the claim] which was accessible at all times." 334 U.S. at 289. The court refused to "assume that petitioner [Price] has acquired no new or additional information since the time of the trial or the first habeas corpus proceeding that might indicate fraudulent conduct on the part of the prosecuting attorneys." 334 U.S. at 290.

16 We note that the following steps, all of them indisputably taken by petitioner's attorneys, were deemed insufficient to constitute a "thorough investigation" :

- o trial counsel formally moved to obtain all written statements from the State;
- o trial counsel renewed his request for such statements;
- o habeas counsel, despite the lack of prior success by trial counsel, nonetheless asserted a Massiah claim;
- o habeas counsel, during their investigation, talked with the Fulton County jailors identified as those most likely to know about any Massiah violation;
- o habeas counsel, having learned about a retired jail official who had been responsible for cell placement in 1978, tracked that jailor down, to no avail;
- o habeas counsel sought from the State, and were given, what the State represented to be "a complete copy of the prosecutor's file," but which was missing the 21-page statement;

The panel's application of this new, "thorough investigation" standard in McCleskey's case reveals it for what it is: a rule holding habeas applicants strictly liable for any failure to uncover evidence on their initial federal application. The only other reasonable reading of the panel's "thorough investigation" standard would simultaneously underscore yet a second transgression of Amadeo v. Zant, for the opinion brushes aside the District Court's express finding that "'reasonably competent counsel' could [not] have discovered the evidence prior to the first federal petition," (App. A, at 25), and that therefore, McCleskey's counsel were not guilty of "inexcusable neglect." (Id.) Either the panel's opinion creates a new, stricter standard of attorney performance than the traditional "inexcusable neglect" branch of abuse law, or the panel's opinion violated Amadeo and Anderson v. Bessemer City, 470 U.S. 564 (1985) sub rosa by reweighing the factual evidence on counsel's performance and disregarding the District Court's clear findings that the investigation undertaken by petitioner's habeas attorneys was reasonable. Under either reading, the opinion is certworthy.

- habeas counsel asked the prosecutor and the informant, under oath, whether there had been an improper relationship;
- when the informant's 21-page statement was uncovered, habeas counsel immediately filed a second petition;
- habeas counsel questioned police officers to learn where the statement had been taken from Evans;
- having learned that it had been taken in a Captain Worthy's office, they found and subpoenaed Worthy on the off chance that he might have relevant knowledge.

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The panel's acceptance of the State's "abuse of the writ" defense, despite the State's unclean hands; its disregard of this Court's earlier teachings on State misconduct; its refusal to apply the rationale of Amadeo v. Zant to a closely analogous habeas; and its creation of a new standard for assessing "deliberate abandonment," all present substantial questions of law meriting full review on certiorari by the Court.

II

THE COURT SHOULD GRANT CERTIORARI TO RESOLVE IMPORTANT UNSETTLED QUESTIONS REGARDING THE APPLICABILITY OF RULE 52(A) STANDARDS TO HARMLESS ERROR

This case also presents important questions regarding the standard to be applied when a federal appellate court reviews a district court's factfindings on the issue of harmless error.

The question arises here because the panel substituted its own findings -- not only on the ultimate issue, but on subsidiary questions of fact -- for those made by the District Court, and it did so without any mention of the clearly erroneous standard of Rule 52(a). Plainly, the panel did not view itself as bound by the clearly erroneous rule in the harmless error context, apparently either in reviewing the underlying historical facts or in making its ultimate determination.

The District Court, however, did make a number of important factfindings that were subsidiary to its conclusion that the State's Massiah violation was not harmless. The District Court began its analysis by correctly noting that there had been no

witnesses to the shooting (App. A, at 30) and that the murder weapon had never been found. (Id.). The Court then found that the bulk of the State's case against petitioner had been three-pronged: (i) evidence that petitioner had carried a .38 Rossi, the pistol that most likely fired the fatal bullets, on the day of the robbery,; (ii) testimony by co-defendant Ben Wright that petitioner told Wright he had pulled the trigger; and (iii) informant Offie Evans' unconstitutionally-tainted testimony about petitioner's "jailhouse confession." (Id.).

In assessing the quality of this evidence, the District Court found that the weight of the first two prongs was not substantial Addressing the first prong -- who was carrying the murder weapon on the day of the crime -- the District Court found that the State had presented conflicting evidence to the jury on this issue. (App. A., at 30). Indeed, one of the State's witnesses on this point, the girlfriend of the co-defendant Ben Wright, acknowledged on cross-examination that she had told police that her boyfriend, Ben Wright, and not McCleskey, had carried the .38 Rossi on the day of the crime. (Tr. T. 682).

As to Ben Wright's damaging testimony about McCleskey's ostensible "confession" to him, the District Court found that it was "obviously impeachable," (App. A, at 30), since Wright was himself a prime suspect in the shooting who had a clear motive to shift responsibility for the murder to someone else.

On the basis of these facts, the District Court concluded that the tainted informant's testimony regarding McCleskey's

jailhouse confession "was critical to the state's case," (App. A, at 30) and, therefore, not harmless.

The panel opinion disregarded these findings of fact, substituting its own instead. As to the identity of the robber who carried the .38 Rossi, for example, the panel cited only the testimony that pointed toward McCleskey (App. C, 890 F.2d at 352); it ignored the strong conflicting testimony identified by the District Court. Similarly, the panel emphasized that co-defendant Ben Wright had testified that McCleskey was the triggerman (App. C, 890 F.2d at 352); but it ignored the District Court's finding that Wright's testimony was "obviously impeachable."

In sum, while the District Court found below that the non-tainted evidence was severely compromised, the panel on appeal independently reweighed that evidence and concluded that it "presented a clear indication of McCleskey's guilt." (App. C, 890 F.2d at 353). Having thus substituted its own reading of the record for that of the District Court, the panel concluded that the State's introduction of Offie Evans' jailhouse confession was harmless error.

As an initial matter, the panel's judgment seems to violate this Court's interpretation of Rule 52(a) set forth in Amadeo v. Zant, __U.S.__, 100 L.Ed.2d 249 (1988). In that case, the Court reasoned that

> [a]lthough there is significant evidence in the record to support the findings of fact favored by the Court of Appeals, there is also significant evidence in the record to support the District Court's contrary conclusion . . . We

> frequently have emphasized that '[w]here there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous.' Anderson v. Bessemer City, 470 U.S. at 574, citing United States v. Yellow Cab. Co., 338 U.S. 338 (1949), and Inwood Laboratories, Inc. v. Ives Laboratories, Inc., 456 U. S. 844 (1982). We reaffirm that stricture today.

100 L.Ed.2d at 262.

Even if the panel in McCleskey's case could be viewed as having done nothing more than to overturn the District Court's ultimate conclusion on a mixed question of fact and law, its judgment would nonetheless raise important questions of federal law which this Court has not previously addressed.

While the federal appeals courts are in general, although not universal, agreement that the question of harmless error is a mixed question of law and fact,[17] they are in conflict on the applicability of Rule 52(a) to such a question. This Court has previously noted the existence of this conflict in Pullman-Standard v. Swint, stating,

> We need not, therefore, address the much-mooted issue of the applicability of the Rule 52(a) standard to mixed questions of law and fact -- i.e., questions in which the historical facts are admitted or established, the rule of law is undisputed, and the issue is whether

17 Graham v. Wilson, 828 F.2d 656, at 659 (10th Cir. 1987) ("Determination of harmless error is a mixed question of law and fact."); Ruff v. Kincheloe, 843 F.2d 1240, at 1242 (9th Cir. 1988) ("The issue of whether the constitutional error ... is harmless is a mixed question of law and fact."); Grizzell v. Wainwright, 692 F.2d 722 at 725 (11th Cir. 1982) ("From decisions in areas involving other types of constitutional errors, it appears that the existence of constitutional harmless error is a mixed question of law and fact..."); contra, United States ex rel. Savory v. Lane, 832 F.2d 1011 at 1018 (7th Cir. 1987) ("At the risk of stating the obvious, we note that whether a constitutional error is harmless is not only a federal question, but one of federal law, and not fact.").

> the facts satisfy the statutory standard, or to put it another way, whether the rule of law as applied to the established facts is or is not violated. There is substantial authority in the Circuits on both sides of this question. (Emphasis added) Compare United States ex rel. Johnson v. Johnson, 531 F.2d 169, 174 n. 12 (CA3 1976); Stafos v. Jarvis, 477 F.2d 369, 372 (CA10 1973); and Johnson v. Salisbury, 448 F.2d 374, 377 (CA8 1970) with Rogers v. Bates, 431 F.2d 16, 18 (CA8 1970); and Pennsylvania Casualty Co. v. McCoy, 167 F.2d 132, 133 (CA5 1948).

456 U.S. 273, 289 n.19 (1982).

Ambiguities in applying Rule 52(a) at various stages of appellate review of mixed questions have continued to this day. Other recent cases in addition to Amadeo, however, strongly suggest that it is error for an appellate court completely to disregard a district court's factfinding, as the panel did in this case. In Strickland v. Washington , 466 U.S. 668, 698 (1984), for example, the Court suggested that the Eleventh Circuit had erred by disregarding Rule 52(a)'s clearly erroneous rule in the context of reviewing a different mixed question of law and fact -- whether trial counsel's performance met minimum Sixth Amendment standards. If the Court's suggestion in Strickland were extended to cover the mixed question of harmless error, the Eleventh Circuit panel would surely be found to have erred in this case as well.

The Court should grant certiorari to clarify the proper role of Rule 52(a) in the appellate review of district court findings on the issue of harmless error.

III.

THE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER THE INTRODUCTION OF A TAINTED CONFESSION CAN BE HARMLESS ERROR

The profound impact which confessions have upon juries was noted by this Court recently in Cruz v. New York:

> "The defendant's own confession is probably the most probative and damaging evidence that can be admitted against him. Though itself an out-of-court statement, it is admitted as reliable evidence because it is an admission of guilt by the defendant and constitutes direct evidence of the facts to which it relates. Even the testimony of an eyewitness may be less reliable than the defendant's own confession. An observer may not correctly perceive, understand, or remember the acts of another, but the admissions of a defendant come from the actor himself, the most knowledgeable and unimpeachable source of information about his past conduct." [Bruton v. United States, 391 U.S. 123], 139-40 (1968). Confessions of defendants have profound impact on juries, so much that we held in Jackson v. Denno . . . that there is justifiable doubt that juries will disregard them even if told to do so.

481 U.S. 186, 195 (1987) (White, J., dissenting)

The panel decision ignored this fundamental insight on the evidentiary power of confessions; it concluded instead that because McCleskey's confession was "not developed at length" during the trial testimony, its admission was harmless error. (App. C, 890 F.2d at 353).

The panel's conclusion runs contrary to this Court's recognition of the substantial qualitative difference in jury impact between confessions and other evidence. The fact that McCleskey's ostensible jailhouse "confession" was not a lengthy one did not diminish its impact on his jury. Indeed, as this Court's precedents make clear, Offie Evans' brief statement that

McCleskey had admitted he was the triggerman, and that McCleskey said he would have killed a dozen officers had it been necessary, need not have been a word longer to have had a dramatic effect.

The panel nonetheless concluded that there was "no reasonable likelihood that the jury's imposition of the death penalty was affected by Evans' testimony." The conclusion simply does not comport with this Court's teachings. Offie Evans' dramatic account of McCleskey's "jailhouse confession" came at the very close of the guilt trial. The State produced only a single additional witness and then began its closing argument. Evans' testimony, therefore, was fresh in the jury's mind at the time of its deliberations, both on guilt and penalty (since no evidence whatsoever was presented at the penalty phase). Evans' testimony played a singular role. No other witness was apparently disinterested and possessed with such important testimony.[18] As this Court noted recently in

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[18] The panel also made reference to the prior judgment of the en banc Eleventh Circuit, which dismissed in 1986, as harmless error, McCleskey's earlier constitutional claim under Giglio. (Although McCleskey had proven on his initial federal application that the State had failed to reveal a promise made to Offie Evans in exchange for his testimony, the en banc court found the error to be harmless.) (App. C, 890 F.2d at 351).

The panel acknowledged that this earlier holding "occurred in the context of McCleskey's Giglio claim," but it nonetheless concluded that the holding "clearly has bearing on the import of Evans' testimony in the context of McCleskey's Massiah claim." (Id.)

What apparently escaped the panel in making this comparison is that the evidentiary impact of these two violations is dramatically different for harmless error purposes. Giglio simply holds that a jury should have heard, in addition to all of Offie Evans' damaging testimony about McCleskey's jailhouse

Satterwhite v. Texas, 486 U.S. 249 (1988), the testimony of a singular, disinterested witness on a critical issue at the penalty phase of a capital trial is rarely, if ever, harmless error.

The panel's holding that an unconstitutionally-obtained confession could not have affected the jury's deliberations, either at the guilt or penalty phase, is contrary to applicable decisions of this Court, and certiorari should be granted to review it.

CONCLUSION

The petition for certiorari should be granted.

Dated: March 23, 1990

Respectfully submitted,

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"confession," one additional piece of information: that Evans was testifying in exchange for a promise. Massiah, by contrast, holds that Offie Evans' entire testimony about Warren McCleskey's "confession" should never have been heard at all. To confound the likely harm to Warren McCleskey from these very different constitutional violations is an error sufficiently serious to cast the panel's entire judgment on this point into the gravest doubt.

APPENDIX A

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

Warren McCleskey
Petitioner

vs. CIVIL ACTION NO. 1:87-cv-1517-JOF

Ralph M. Kemp, Warden
Respondent

JUDGMENT

The Court, Honorable J. OWEN FORRESTER, United States District Judge, by order of this date, having GRANTING the petition for a writ of habeas corups, DIRECTING, the petitioner to re-try defendant within 120 days from receipt of the 12/23/87 order.

JUDGMENT is hereby entered in favor of the ~~respondent(s)~~ petitioner and against the ~~petitioner(s)~~ respondent.

Dated at Atlanta, Georgia, this 15 day of January, 1988.
with permission of the court Nunc pro tunc for December 23, 1987.

LUTHER D. THOMAS, Clerk

By: _____
Deputy Clerk

FILED AND ENTERED
IN CLERK'S OFFICE
January 13, 1987
LUTHER D. THOMAS, Clerk

By: _____
Deputy Clerk

FILED IN CLERK'S OFFICE
U.S.D.C. - Atlanta

DEC 23 1987

LUTHER D. THOMAS, Clerk
By: _____ Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

WARREN McCLESKEY,
Petitioner,

vs. CIVIL ACTION NO. C87-1517A

RALPH M. KEMP, Superintendent
Georgia Diagnostic and
Classification Center,
Respondent.

ORDER

I. INTRODUCTION.

Petitioner Warren McCleskey, convicted and sentenced to death in October 1978 for the murder of Police Officer Frank Schlatt during the course of a furniture store robbery,[1] petitions this court for a writ of habeas corpus on seven separate grounds: (1) that the state's non-disclosure of critical impeachment evidence violated his due process rights (the Giglio claim); (2) that his capital sentence was the product of intentional racial discrimination in violation of his eighth amendment and equal protection rights (the intentional discrimination claim); (3) that the trial court's denial of funds to employ experts in his defense violated his due process rights (the Ake claim); (4) that the use of the petitioner's alleged statements to a jailhouse informant violated his sixth amendment and due process rights (the Massiah claim); (5) that the state's failure to correct a

witness's misleading testimony violated his eighth amendment and due process rights (the Mooney claim); (6) that the state's reference to appellate review in its closing argument violated his eighth amendment and due process rights (the Caldwell claim); and (7) that the state's systematic exclusion of black jurors violated his sixth amendment and equal protection rights (the Batson claim).

For the reasons discussed below, the petition for a writ of habeas corpus will be granted as to the Massiah claim but denied as to all other claims. In Part II of this order the court will detail the history of the petitioner's efforts to avoid the death penalty. Then, because the successive nature of this petition dominates the court's discussion and will be dispositive of many of the issues raised by the petition, Part III will set out the general principles of finality in habeas corpus actions. Next, the court will address each of the seven claims raised in this petition; first, the successive claims in Part IV (the Giglio, intentional discrimination, and Ake claims) and then the new claims in Part V (the Massiah, Mooney, Caldwell, and Batson claims). Finally, in Part VI, the court will address the petitioner's other pending motions -- a motion for discovery and a motion to exceed page limits.

II. HISTORY OF PRIOR PROCEEDINGS.

The petitioner was convicted and sentenced in the Superior Court of Fulton County on October 12, 1978. The convictions and sentences were affirmed by the Supreme Court of Georgia.

McCleskey v. State, 245 Ga. 108 (1980). The United States Supreme Court then denied a petition for certiorari, McCleskey v. Georgia, 449 U.S. 891 (1980). On December 19, 1980, the petitioner filed an extraordinary motion for a new trial in Fulton County Superior Court, but no hearing has ever been held on that motion. On January 5, 1981 the petitioner filed a petition for writ of habeas corpus in the Butts County Superior Court. On April 8, 1981, that court denied all relief. On June 17, 1981 the Georgia Supreme Court denied the petitioner's application for a certificate of probable cause to appeal. The United States Supreme Court again denied a petition for a writ of certiorari. McCleskey v. Zant, 454 U.S. 1093 (1981).

McCleskey filed his first federal habeas corpus petition in this court on December 30, 1981. This court held an evidentiary hearing in August and October 1983 and granted habeas corpus relief on one issue on February 1, 1984. McCleskey v. Zant, 580 F. Supp. 338 (N.D.Ga. 1984). The Eleventh Circuit reversed and denied the habeas corpus petition on January 29, 1985. McCleskey v. Kemp, 753 F.2d 877 (11th Cir. 1985) (en banc). This time the United States Supreme Court granted certiorari and affirmed the Eleventh Circuit on April 22, 1987. McCleskey v. Kemp, ___ U.S. ___, 107 S.Ct. 1756, petition for rehearing denied, ___ U.S. ___, 107 S.Ct. 3199 (1987). McCleskey filed a successive petition for a writ of habeas corpus in the Butts County Superior Court on June 9, 1987, and a First Amendment to the Petition on June 22, 1987 (Civil Action No. 87-V-1028). That court granted the

state's motion to dismiss the petition on July 1, 1987. The Georgia Supreme Court denied the petitioner's application for a certificate of probable cause to appeal on July 7, 1987 (Application No. 4103).

This court issued an order on June 16, 1987 making the mandate of the Eleventh Circuit the judgment of this court and lifting the stay of execution that had been entered when the first federal habeas corpus petition was filed. On July 7, 1987 McCleskey filed the present petition for a writ of habeas corpus, a request to proceed in forma pauperis, a motion for discovery, and a motion for a stay of execution. The court granted the request to proceed in forma pauperis and held an evidentiary hearing on the petition on July 8 and 9, 1987. At that time, the court granted the motion for a stay of execution. The court took further evidence in a hearing on August 10, 1987 and, at the close of the evidence, requested post-hearing briefs from the parties. Those briefs have since been filed and the petitioner's claims are ripe for determination.

III. THE DOCTRINE OF FINALITY IN HABEAS CORPUS PETITIONS.

Although successive petitions for a writ of habeas corpus are not subject to the defense of res judicata, Congress and the courts have fashioned a "modified doctrine of finality" which precludes a determination of the merits of a successive petition under certain circumstances. Bass v. Wainwright, 675 F.2d 1204, 1206 (11th Cir. 1982). In particular, Congress has authorized the federal courts to decline to address the merits of a petition

if the claims contained therein were decided upon the merits previously or if any new grounds for relief that are asserted should have been raised in the previous petition. 28 USC §2244(a) & (b). The habeas rules have described these distinct applications of the doctrine of finality as follows:

> A second or successive petition may be dismissed if the judge finds that it fails to allege new or different grounds for relief and the prior determination was on the merits or, if new and different grounds are alleged, the judge finds that the failure of the petitioner to assert those grounds in a prior petition constituted an abuse of the writ.

28 USC foll. §2254, Rule 9(b).

A purely successive petition or successive claim raises issues which have been decided adversely on a previous petition. The court may take judicial notice of allegations raised by a previous petition. See Allen v. Newsome, 795 F.2d 934, 937 (11th Cir. 1986). Rule 9(b) requires that the issue raised by the previous petition must have been decided adversely to the petitioner on the merits before the doctrine of finality obtains. A merits determination need not be a determination made after an evidentiary hearing if the facts material to the successive claim were undisputed at the time of the previous petition. Bass, 675 F.2d at 1206.

A truly successive petition may be distinguished from the second category of petitions subject to the finality doctrine: petitions alleging new claims that may be an "abuse of the writ." 28 USC §2244(b); 28 USC foll. §2254, Rule 9(b). The state has

the burden of pleading abuse of the writ; the burden then shifts to the petitioner to show that he has not abused the writ. Price v. Johnston, 334 U.S. 266, 292-93 (1948); see also Allen v. Newsome, 795 F.2d 934, 938-39 (11th Cir. 1986). To meet his burden, a petitioner must "give a good excuse for not having raised his claims previously." Allen 794 F.2d at 939. An evidentiary hearing on an abuse of the writ defense is not necessary if the record affords an adequate basis for decision. Price, 334 U.S. at 292-93.

As this circuit has articulated the issue presented by an abuse of the writ defense, "[a] district court need not consider a claim raised for the first time in a second habeas petition, unless the petitioner establishes that the failure to raise the claim earlier was not the result of intentional abandonment or withholding or inexcusable neglect." Adams v. Dugger, 816 F.2d 1493, 1494 (11th Cir. 1987) (citations omitted). See also Moore v. Kemp, 824 F.2d 847, 851 (11th Cir. 1987). There are a number of instances in which failure to raise an issue in a prior petition is excusable. "A retroactive change in the law and newly discovered evidence are examples." 28 USC foll. §2254, Rule 9 Advisory Committee Notes. See, e.g., Ritter v. Thigpen, 828 F.2d 662, 665 (11th Cir. 1987); Adams, 816 F.2d at 1495. Of course, failure to discover evidence supportive of a claim prior to the first petition may itself constitute inexcusable neglect or

deliberate bypass. Cf. Freeman v. Georgia, 599 F.2d 65, 71-72 (5th Cir. 1979) (no procedural default where petitioner was misled by police and could not have uncovered evidence supportive of a claim in any event).[2]

Even if a particular claim is truly successive or, if it is a new claim, is an abuse of the writ, a court may consider the merits of the claim if "the ends of justice" would be served thereby. See Sanders v. United States, 373 U.S. 1, 16 (1963) (successive claim); id. at 18 (new claim); Smith v. Kemp, 715 F.2d 1459, 1468 (11th Cir. 1983) (successive claim); Moore v. Kemp 824 F.2d at 856 (new claim). The burden is upon the petitioner to show that the ends of justice would be served. Sanders, 373 U.S. at 17.

The "ends of justice" exception has been subject to differing interpretations. The Court in Sanders suggested some circumstances in which the "ends of justice" would be served by re-visiting a successive claim:

> If factual issues are involved, the applicant is entitled to a new hearing upon a showing that the evidentiary hearing on the prior application was not full and fair; we canvassed the criteria of a full and fair evidentiary hearing recently in Townsend v. Sain, [372 U.S. 293 (1963)], and that discussion need not be repeated here. If purely legal questions are involved, the applicant may be entitled to a new hearing upon showing an intervening change in the law or some other justification for having failed to raise a crucial point or argument in the prior application. ... [T]he foregoing enumeration is not intended to be exhaustive; the test is "the ends of justice" and it cannot be too finely particularized.

373 U.S. at 16-17. This circuit has traditionally followed the Sanders articulation of the "ends of justice" exception. See, e.g., Moore v. Kemp, 824 F.2d at 856; Smith v. Kemp, 715 F.2d at 1468.

A plurality of the Supreme Court recently challenged this open-ended definition of "the ends of justice," arguing that a successive claim should not be addressed unless the petitioner "supplements his constitutional claim with a colorable showing of factual innocence." Kuhlmann v. Wilson, ___ U.S. ___, 106 S.Ct. 2616, 2627 (1986) (Opinion of Powell, J., joined by Burger, Rehnquist, and O'Connor, JJ.). Under this definition of the "ends of justice," the petitioner "must make his evidentiary showing even though ... the evidence of guilt may have been unlawfully admitted." Id. That is, petitioner must "show a fair probability that, in light of all the evidence, including that alleged to have been illegally admitted (but with due regard to any unreliability of it) and evidence tenably claimed to have been wrongfully excluded or to have become available only after trial, the trier of facts would have entertained a reasonable doubt of his guilt." Id. n. 17 (quoting Friendly, Is Innocence Irrelevant? Collateral Attack on Criminal Judgments, 38 U.Chi.L.Rev. 142 (1970)).

Following Kuhlmann, "[i]t is not certain what standards should guide a district court in determining whether the 'ends of justice' require the consideration of an otherwise dismissable successive habeas petition." Moore, 824 F.2d at 856. The

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Eleventh Circuit, in Moore, declined to decide "whether a colorable showing of factual innocence is a necessary condition for the application of the ends of justice exception." Id. The court merely held that, "at a minimum, the ends of justice will demand consideration of the merits of a claim on a successive petition where there is a colorable showing of factual innocence." Id.

IV. PETITIONER'S SUCCESSIVE CLAIMS.

Three of the petitioner's claims in this second federal habeas petition duplicate claims in the first federal petition and are therefore truly successive claims that should be dismissed according to the dictates of Rule 9(b) unless the petitioner can show that the "ends of justice" justify re-visiting the claims. Each claim will be discussed in turn.

A. Giglio Claim.

Petitioner's Giglio claim is based upon the state's failure to disclose its agreement with a witness, Offie Evans, which led him to testify against petitioner at trial. McCleskey argues that the state's failure to disclose the promise by a police detective to "speak a word" for Offie Evans with regard to an escape charge violated McCleskey's due process rights under Giglio v. United States, 405 U.S. 150 (1971). Giglio held that failure to disclose the possible interest of a government witness will entitle a defendant to a new trial if there is a reasonable likelihood that the disclosure would have affected the judgment of the jury. Id. at 154. This court granted habeas corpus

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relief on this claim in passing upon the first federal habeas petition, but the Eleventh Circuit reversed en banc. McCleskey v. Zant, 580 F. Supp. at 380-84, rev'd sub nom. McCleskey v. Kemp, 753 F.2d at 885.

McCleskey argues that the ends of justice require re-visiting his Giglio claim for three reasons. He argues that the discovery of a written statement by Offie Evans provides new evidence of a relationship between Offie Evans and the state supportive of a finding of a quid pro quo for Offie Evans' testimony. He also proffers the affidavit testimony of jurors who indicate that they might have reached a different verdict had they known the real interest of Offie Evans in testifying against petitioner. Finally, petitioner contends that there has been a change in the law regarding the materiality standard for a finding of a Giglio violation.

None of these arguments is sufficient to justify re-visiting the Giglio claim. The written statement of Offie Evans offers no new evidence of an agreement by state authorities to do Offie Evans a favor if he would testify against petitioner. Consequently, the conclusion of the Eleventh Circuit that the detective's promise did not amount to a promise of leniency triggering Giglio is still valid. See McCleskey v. Kemp, 753 F.2d at 885. Because the threshold showing of a promise still has not been made, the ends of justice would not be served by allowing petitioner to press this claim again.

Petitioner also has no newly discovered evidence with respect to the materiality of the state's failure to disclose its arrangement with Offie Evans. The affidavit testimony of the jurors is not evidence that petitioner could not have obtained at the time of the first federal habeas petition. In any event, a juror is generally held incompetent to testify in impeachment of a verdict. Fed. R. Evid. 606(b); Proffitt v. Wainwright, 685 F.2d 1227, 1255 (11th Cir. 1982). See generally McCormick on Evidence §608 (3d Ed. 1984).

Finally, petitioner can point to no change in the law on the standard of materiality. The Eleventh Circuit concluded in this case that there was "no 'reasonable likelihood' that the State's failure to disclose the detective's [promise] affected the judgment of the jury." McCleskey, 753 F.2d at 884. The same standard still guides this circuit in its most recent decisions on the issue. See, e.g., United States v. Burroughs, No. 86-3566, Slip Op. at 381 (11th Cir., Nov. 3, 1987); Brown, 785 F.2d at 1464 (citing McCleskey v. Kemp, 753 F.2d at 885).

B. Intentional Discrimination Claim.

Having lost in the Supreme Court[3] on his contentions regarding the Baldus Study, the petitioner nevertheless trotted it out to support the more narrow contention that McCleskey was singled out both because he is black and because his victim was white.

The Baldus Study is said to be the most ambitious yet. It is. The part of it that is ambitious, however -- the 230-variable model structured and validated by Dr. Baldus -- did not adduce one smidgen of evidence that the race of the defendants or the race of the victims had any effect on the Georgia prosecutors' decisions to seek the death penalty or the juries' decisions to impose it. The model that Dr. Baldus testified accounted for all of the neutral variables did not produce any "death-odds multiplier" of 4 or 6 or 11 or 14 or any of the other numbers which the media have reported.

To be sure, there are some exhibits that would show discrimination and do contain such multipliers. But these were not produced by the "ambitious" 230-variable model of the study. The widely-reported "death-odds multipliers" were produced instead by arbitrarily structured little rinky-dink regressions that accounted for only a few variables. They are of the sort of statistical analysis given short shrift by courts and social scientists alike in the past. They prove nothing other than the truth of the adage that anything may be proved by statistics.

The facts are that the only evidence of over-zealousness or improprieties by any person(s) in the law enforcement establishment points to the black case officers of the Atlanta Bureau of Police Services,[4] which was then under the leadership of a black superior who reported to a black mayor in a majority black city. The verdict was returned by a jury on which a black person sat and, although McCleskey has adduced affidavits from jurors on

other subjects, there is no evidence that the black juror voted for conviction and the death penalty because she was intimidated by the white jurors. It is most unlikely that any of these black citizens who played vital roles in this case charged, convicted or sentenced McCleskey because of the racial considerations alleged.

There is no other evidence that race played a part in this case.

C. Ake Claim.

Petitioner's last truly successive claim is based upon the trial court's denial of his request for the provision of funds for experts, particularly for a ballistics expert. Petitioner alleges that this ruling by the trial court denied him his right to due process of law as guaranteed by the fourteenth amendment. Petitioner raised this same claim in the first federal habeas petition and this court held that the claim was without merit. McCleskey v. Zant, 580 F. Supp. at 388-89 (citing Moore v. Zant, 722 F.2d 640 (11th Cir. 1983)). At that time the law held that the appointment of experts was generally a matter within the discretion of the trial judge and could not form the basis for a due process claim absent a showing that the trial judge's decision rendered the defendant's trial fundamentally unfair. Moore, 722 F.2d at 648. With that case law in mind, this court concluded that the state trial court had not abused its discretion because the petitioner had the opportunity to subject

the state's ballistics expert to cross-examination and because there was no showing of bias or incompetence on the part of the state's expert. McCleskey v. Zant, 580 F. Supp. at 389.

Arguing that the ends of justice require re-visiting the claim, petitioner points to the cases of Ake v. Oklahoma, 470 U.S. 68, 83 (1985) and Caldwell v. Mississippi, 472 U.S. 320, 323 n. 1 (1985) (plurality), as examples of a change in the law regarding the provision of experts. It may be that these cases did change the law; this matter, which was traditionally thought to rest within the discretion of state trial judges, now has heightened constitutional significance. Compare Moore v. Zant, 722 F.2d at 648, with Moore v. Kemp, 809 F.2d 702, 709-12 (11th Cir. 1987).

Even so, this new law does not justify re-visiting this claim. The new Supreme Court cases require "that a defendant must show the trial court that there exists a reasonable probability both that an expert would be of assistance to the defense and that denial of expert assistance would result in a fundamentally unfair trial. Thus, if a defendant wants an expert to assist his attorney in confronting the prosecution's proof ... he must inform the court of the nature of the prosecution's case and how the requested expert would be useful." Moore v. Kemp, 809 F.2d at 712. A review of the state trial record indicates that petitioner did nothing more than generally refer to the extensive expert testimony available to the state. Petitioner then specifically requested the appointment of a psychiatric expert.

The petitioner never specifically requested the appointment of a ballistics expert, nor did he make the showing that this circuit has held is required by Ake and Caldwell. The state trial court could hardly have been expected to appreciate the importance of a ballistics expert to petitioner's case if petitioner himself neither requested such an expert nor explained the significance of such an expert to the court.

V. PETITIONER'S NEW CLAIMS.

A. Massiah Claim.

1. Findings of Fact.

Petitioner relies primarily on the testimony of Ulysses Worthy before this court and the recently disclosed written statement of Offie Evans to support his Massiah claim. Ulysses Worthy, who was captain of the day watch at the Fulton County Jail during the summer of 1978 when petitioner was being held there awaiting his trial for murder and armed robbery, testified before this court on July 9 and August 10, 1987. The court will set out the pertinent parts of that testimony and then summarize the information it reveals.

On July 9, Worthy testified as follows: He recalled "something being said" to Evans by Police Officer Dorsey or another officer about engaging in conversations with McCleskey (II Tr. 147-49).[5] He remembered a conversation, where Detective Dorsey and perhaps other officers were present, in which Evans was asked to engage in conversations with McCleskey (II Tr. 150).

Later, Evans requested permission to call the detectives (II Tr. 151). Assistant District Attorney Russell Parker and Detective Harris used Worthy's office to interview Evans at one point, which could have been the time they came out to the jail at Evans' request (Id.).

In other cases, Worthy had honored police requests that someone be placed adjacent to another inmate to listen for information (II Tr. 152); such requests usually would come from the officer handling the case (Id.); he recalled specifically that such a request was made in this case by the officer on the case (II Tr. 153). Evans was put in the cell next to McCleskey at the request of the officer on the case (Id.); "someone asked [him] to specifically place Offie Evans in a specific location in the Fulton County Jail so he could overhear conversations with Warren McCleskey," but Worthy did not know who made the request and he was not sure whether the request was made when Evans first came into the jail (II Tr. 153-54); he did not recall when he was asked to move Evans (II Tr. 155-56).

On August 10, 1987 Worthy testified as follows: Evans was first brought to his attention when Deputy Hamilton brought Evans to Worthy's office because Evans wanted to call the district attorney or the police with "some information he wanted to pass to them" (III Tr. 14). The first time the investigators on the Schlatt murder case talked to Evans was "a few days" after Evans' call (III Tr. 16-17). That meeting took place in Worthy's office (III Tr. 17). Worthy was asked to move Evans "from one cell to

another" (III Tr. 18). Worthy was "not sure" who asked, "but it would have had ... to have been one of the officers," Deputy Hamilton, or Evans (III Tr. 18-19). Deputy Hamilton asked Worthy to move Evans "perhaps 10, 15 minutes" after Evans' interview with the investigators (III Tr. 20). This was the first and only time Worthy was asked to move Evans (Id.). Deputy Hamilton would have been "one of the ones" to physically move Evans (III Tr. 22). Worthy did not know for a fact that Evans was ever actually moved (Id.). The investigators later came out to interview Evans on other occasions, but not in Worthy's presence (III Tr. 23). Neither Detectives Harris, Dorsey or Jowers nor Assistant District Attorney Parker ever asked Worthy to move Evans (III Tr. 24).

On cross-examination, Worthy re-affirmed portions of his July 9 testimony: He overheard someone ask Evans to engage in conversation with McCleskey at a time when Officer Dorsey and another officer were present (III Tr. 32-33). Evans requested permission to call the investigators after he was asked to engage in conversation with McCleskey (III Tr. 33). Usually the case officer would be the one to request that an inmate be moved and that was the case with Evans, though he does not know exactly who made the request (III Tr. 46-48). Worthy also contradicted portions of his July 9 testimony, stating that the interview at which Assistant District Attorney Parker was present was the first time Evans was interviewed and that Worthy had not met Officer Dorsey prior to that time (III Tr. 36). On further

cross-examination, Worthy testified as follows: Deputy Hamilton was not a case officer but was a deputy at the jail (III Tr. 49). When Worthy testified on July 9 he did not know what legal issues were before the court (III Tr. 52-53). After his July 9 testimony he met with the state's attorneys on two occasions for a total of forty to fifty minutes (III Tr. 53-54). After his July 9 testimony he read a local newspaper article mentioning him (III Tr. 56).

In response to questions from the court, Worthy stated that he was satisfied that he was asked for Evans "to be placed near McCleskey's cell," that "Evans was asked to overhear McCleskey talk about this case," and that Evans was asked to "get some information from" McCleskey (III Tr. 64-65). Worthy maintained that these requests were made on the date that Assistant District Attorney Parker interviewed Evans, but he could not explain why the investigators would have requested a move on the same day that Evans had already told the investigators that he was next to McCleskey, that he had been listening to what McCleskey had been saying, and that he had been asking McCleskey questions (III Tr. 64).

In summary, Worthy never wavered from the fact that someone, at some point, requested his permission to move Evans to be near McCleskey. Worthy's July 9 testimony indicates the following sequence: The request to move Evans, the move, Evans' request to call the investigators, the Parker interview, and other later interviews. Worthy's August 10 testimony indicates a different

sequence: Evans' request to call the investigators, the Parker interview, the request to move Evans by Deputy Hamilton, and other later interviews. Worthy's testimony is inconsistent on Officer Dorsey's role in requesting the move, on whether Deputy Hamilton requested the move, and on whether the request to move Evans preceded Evans' request to call the investigators. Worthy has no explanation for why the authorities would have requested to move Evans after the Parker interview, at which Evans made it clear that he was already in the cell adjacent to McCleskey's.

All of the law enforcement personnel to whom Worthy informed -- Deputy Hamilton, Detectives Dorsey, Jowers and Harris, and Assistant District Attorney Parker -- flatly denied having requested permission to move Evans or having any knowledge of such a request being made (III Tr. 68-71; 80-81, 95; 97-98; 102-03; 111-12, 116). It is undisputed that Assistant District Attorney Parker met with Evans at the Fulton County Jail on only one occasion, July 12, 1978, and that Evans was already in the cell next to McCleskey's at that time (III Tr. 113-14; 71-72).

Petitioner also relies on Evans' twenty-one page statement to the Atlanta Police Department, dated August 1, 1978, in support of his claim that the authorities deliberately elicited incriminating information from him in violation of his sixth amendment right to counsel. Evans' statement relates conversations he overheard between McCleskey and McCleskey's co-defendant DuPree and conversations between himself and McCleskey from July 9 to July 12, 1978. McCleskey's statements during the

course of those conversations were highly incriminating. In support of his argument that the authorities instigated Evans' information gathering, McCleskey points to the methods Evans used to secure McCleskey's trust and thereby stimulate incriminating conversation. Evans repeatedly lied to McCleskey, telling him that McCleskey's co-defendant, Ben Wright, was Evans' nephew; that Evans' name was Charles; that Ben had told Evans about McCleskey; that Evans had seen Ben recently; that Ben was accusing McCleskey of falsely identifying Ben as the "trigger man" in the robbery; that Evans "used to stick up with Ben too;" that Ben told Evans that McCleskey shot Officer Schlatt; and that Evans was supposed to have been in on the robbery himself.

In addition, McCleskey argues that Evans' knowledge that McCleskey and other co-defendants had told police that co-defendant Ben Wright was the trigger person demonstrates Evans' collusion with the police since that fact had not been made public at that time. Finally, McCleskey points to two additional pieces of evidence about Evans' relationship with the police: Evans testified at McCleskey's trial that he had talked to Detective Dorsey about the case before he talked to Assistant District Attorney Parker (Pet. Exh. 16 at 119); and Evans had acted as an informant for Detective Dorsey before (II Tr. 52-3).

The factual issue for the court to resolve is simply stated: Either the authorities moved Evans to the cell adjoining McCleskey's in an effort to obtain incriminating information or they did not. There is evidence to support the argument that

Evans was not moved, that he was in the adjoining cell fortuitously, and that his conversations with McCleskey preceded his contact with the authorities. Worthy's testimony is often confused and self-contradictory, it is directly contrary to the testimony of Deputy Hamilton and Detective Dorsey, it is contrary to Evans' testimony at McCleskey's trial that he was put in the adjoining cell "straight from the street" (Trial Tr. 873), and it is contrary to the opening line of Evans' written statement which says, "I am in the Fulton County Jail cell # 1 north 14 where I have been since July 3, 1978 for escape." Worthy himself testified that escape risks where housed in that wing of the jail (III Tr. 13-14). Moreover, the use of Evans as McCleskey alleges, if it occurred, developed into a complicated scheme to violate McCleskey's constitutional rights -- its success required Evans and any officers involved to lie and lie well about the circumstances. For these reasons, the state asks this court to reject Worthy's testimony that someone requested permission to move Evans next to McCleskey's cell.

After carefully considering the substance of Worthy's testimony, his demeanor, and the other relevant evidence in this case, the court concludes that it cannot reject Worthy's testimony about the fact of a request to move Offie Evans. The fact that someone, at some point, requested his permission to move Evans is the one fact from which Worthy never wavered in his two days of direct and cross-examination. The state has introduced no affirmative evidence that Worthy is either lying or mistaken.

The lack of corroboration by other witnesses is not surprising; the other witnesses, like Assistant District Attorney Parker, had no reason to know of a request to move Evans or, like Detective Dorsey, had an obvious interest in concealing any such arrangement. Worthy, by contrast, had no apparent interest or bias that would explain any conscious deception. Worthy's testimony that he was asked to move Evans is further bolstered by Evans' testimony that he talked to Detective Dorsey before he talked to Assistant District Attorney Parker and by Evans' apparent knowledge of details of the robbery and homicide known only to the police and the perpetrators.

Once it is accepted that Worthy was asked for permission to move Evans, the conclusion follows swiftly that the sequence of events to which Worthy testified originally must be the correct sequence; i.e., the request to move Evans, the move, Evans' request to call the investigators, the Parker interview, and other later interviews. There are two other possible conclusions about the timing of the request to move Evans, but neither is tenable. First, the request to move Evans could have come following Evans' meeting with Assistant District Attorney Parker, as Worthy seemed to be testifying on August 10 (III Tr. 20). However, a request at that point would have been nonsensical because Evans was already in the cell adjoining McCleskey's. Second, it could be that Evans was originally in the cell next to McCleskey, that he overheard the incriminating statements prior to any contact with the investigators, that

McCleskey was moved to a different cell, and that the authorities then requested permission to move Evans to again be adjacent to McCleskey. As the state concedes, this possibility is mere speculation and is not supported by any evidence in the record. Post-Hearing Brief at 53.

For the foregoing reasons, the court concludes that petiticner has established by a preponderance of the evidence the following sequence of events: Evans was not originally in the cell adjoining McCleskey's; prior to July 9, 1978, he was moved, pursuant to a request approved by Worthy, to the adjoining cell for the purpose of gathering incriminating information; Evans was probably coached in how to approach McCleskey and given critical facts unknown to the general public; Evans engaged McCleskey in conversation and eavesdropped on McCleskey's conversations with DuPree; and Evans reported what he had heard between July 9 and July 12, 1978 to Assistant District Attorney Parker on July 12.

2. Abuse of the Writ Questions.

The state argues that petitioner's Massiah claim in this second federal habeas petition is an abuse of the writ because he intentionally abandoned the claim after his first state habeas petition and because his failure to raise this claim in his first federal habeas petition was due to inexcusable neglect. As was noted earlier, the burden is on petitioner to show that he has not abused the writ. Allen, 795 F.2d at 938-39. The court concludes that petitioner's Massiah claim is not an abuse of the writ.

First, petitioner cannot be said to have intentionally abandoned this claim. Although petitioner did raise a Massiah claim in his first state petition, that claim was dropped because it was obvious that it could not succeed given the then-known facts. At the time of his first federal petition, petitioner was unaware of Evans' written statement, which, as noted above, contains strong indications of an ab initio relationship between Evans and the authorities. Abandoning a claim whose supporting facts only later become evident is not an abandonment that "for strategic, tactical, or any other reasons ... can fairly be described as the deliberate by-passing of state procedures." Fay v. Noia, 372 U.S. 391, 439 (1963), quoted in Potts v. Zant, 638 F.2d 727, 743 (5th Cir. 1981). Petitioner's Massiah claim is therefore not an abuse of the writ on which no evidence should have been taken. This is not a case where petitioner has reserved his proof or deliberately withheld his claim for a second petition. Cf. Sanders v. United States, 373 U.S. 1, 18 (1963). Nor is the petitioner now raising an issue identical to one he earlier considered without merit. Cf. Booker v. Wainwright, 764 F.2d 1371, 1377 (11th Cir. 1985).

Second, petitioner's failure to raise this claim in his first federal habeas petition was not due to his inexcusable neglect. When the state alleges inexcusable neglect, the focus is on "the petitioner's conduct and knowledge at the time of the preceding federal application. ... He is chargeable with counsel's actual awareness of the factual and legal bases of the

claim at the time of the first petition and with the knowledge that would have been possessed by reasonably competent counsel at the time of the first petition." Moore, 824 F.2d at 851. Here, petitioner did not have Evans' statement or Worthy's testimony at the time of his first federal petition; there is therefore no inexcusable neglect unless "reasonably competent counsel" would have discovered the evidence prior to the first federal petition. This court concluded at the evidentiary hearing that petitioner's counsel's failure to discover Evans' written statement was not inexcusable neglect (I Tr. 118-19). The same is true of counsel's failure to discover Worthy's testimony. Petitioner's counsel represents, and the state has not disputed, that counsel did conduct an investigation of a possible Massiah claim prior to the first federal petition, including interviewing "two or three jailers." Petitioner's Post-Hearing Reply Brief at 5. The state has made no showing of any reason that petitioner or his counsel should have known to interview Worthy specifically with regard to the Massiah claim. The state argues that petitioner's counsel should have at least interviewed Detectives Harris and Dorsey and Deputy Hamilton. Given that all three denied any knowledge of a request to move Evans next to McCleskey, it is difficult to see how conducting such interviews would have allowed petitioner to assert this claim any earlier. See Ross v. Kemp, 785 F.2d 1467, 1478 (11th Cir. 1986) (remanding for evidentiary hearing on

inexcusable neglect where petitioner's counsel may have relied on misrepresentations by the custodian of the relevant state records).

In short, the petitioner's Massiah claim as it is currently framed is not an abuse of the writ because it is distinct from the Massiah claim originally raised in his first state petition and because it is based on new evidence. Petitioner's failure to discover this evidence earlier was not due to inexcusable neglect. Because this claim is not an abuse of the writ it is not a successive petition under section 2244(b) and therefore the court need not inquire whether the petitioner has made a colorable showing of factual innocence, if that showing is now the equivalent of the "ends of justice." Fuhlmann, 106 S.Ct. at 2628 n. 18.

3. Conclusions of Law.

The Eleventh Circuit recently summarized the petitioner's burden in cases such as this:

> In order to establish a violation of the Sixth Amendment in a jailhouse informant case, the accused must show (1) that a fellow inmate was a government agent; and (2) that the inmate deliberately elicited incriminating statements from the accused.

Lightbourne v. Dugger, 829 F.2d 1012, 1023 (11th Cir. 1987). The coincidence of similar elements first led the Supreme Court to conclude that such a defendant was denied his sixth amendment right to assistance of counsel in Massiah v. United States, 377 U.S. 201 (1964). In that case, the defendant's confederate

cooperated with the government in its investigation and allowed his automobile to be "bugged." The confederate subsequently had a conversation in the car with the defendant during which the defendant made incriminating statements. The confederate then testified about the defendant's statements at the defendant's trial. The Supreme Court held that the defendant had been "denied the basic protections of [the sixth amendment] when it was used against him at his trial evidence of his own incriminating words, which federal agents had deliberately elicited from him after he had been indicted and in the absence of his counsel." Id. at 206.[6]

The Supreme Court applied its ruling in Massiah to the jailhouse informant situation in United States v. Henry, 447 U.S. 264 (1980). In that case, a paid informant for the FBI happened to be an inmate in the same jail in which defendant Henry was being held pending trial. An investigator instructed the informant inmate to pay particular attention to statements made by the defendant, but admonished the inmate not to solicit information from the defendant regarding the defendant's indictment for bank robbery. The inmate engaged the defendant in conversations regarding the bank robbery and subsequently testified at trial against the defendant based upon these conversations. The Supreme Court held that the inmate had deliberately elicited incriminating statements by engaging the defendant in conversation about the bank robbery. Id. at 271. It

was held irrelevant under Massiah whether the informant questioned the defendant about the crime or merely engaged in general conversation which led to the disclosure of incriminating statements about the crime. Id. at 271-72 n. 10. Although the government insisted that it should not be held responsible for the inmate's interrogation of the defendant in light of its specific instructions to the contrary, the Court held that employing a paid informant who converses with an unsuspecting inmate while both are in custody amounts to "intentionally creating a situation likely to induce [the defendant] to make incriminating statements without the assistance of counsel." Id. at 274.[7]

Given the facts established earlier, petitioner has clearly established a Massiah violation here. It is clear from Evans' written statement that he did much more than merely engage petitioner in conversation about petitioner's crimes. As discussed earlier, Evans repeatedly lied to petitioner in order to gain his trust and to draw him into incriminating statements. Worthy's testimony establishes that Evans, in eliciting the incriminating statements, was acting as an agent of the state. This case is completely unlike Kuhlmann v. Wilson, 106 S.Ct. 2616 (1986), where the Court found no Massiah violation because the inmate informant had been a passive listener and had not deliberately elicited incriminating statements from the defendant.

Here, Evans was even more active in eliciting incriminating statements than was the informant in Henry. The conclusion is inescapable that petitioner's sixth amendment rights, as interpreted in Massiah, were violated.

However, "[n]ot every interrogation in violation of the rule set forth in Massiah ... mandates reversal of a conviction." United States v. Kilrain, 566 F.2d 979, 982 (5th Cir. 1978). Instead, "the proper rule [is] one of exclusion of tainted evidence rather than a per se standard of reversal if any constitutional violation ha[s] occurred." Id. n. 3, citing Brewer v. Williams, 430 U.S. 387, 407 n. 12 (1977); United States v. Hayles, 471 F.2d 788, 793, cert. denied, 411 U.S. 969 (5th Cir. 1973). In other words, "certain violations of the right to counsel may be disregarded as harmless error." United States v. Morrison, 449 U.S. 361, 365 (1981), citing Chapman v. California, 386 U.S. 18, 23 n. 8 (1967). To avoid reversal of petitioner's conviction the state must "prove beyond a reasonable doubt that the error complained of [the use at petitioner's trial of his own incriminating statements obtained in violation of his sixth amendment rights] did not contribute to the verdict obtained." Chapman, 386 U.S. at 24. See also Brown v. Dugger, No. 85-6082, Slip Op. at 511-12 (11th Cir. November 13, 1987).

Once the fact of the Massiah violation in this case is accepted, it is not possible to find that the error was harmless. A review of the evidence presented at the petitioner's trial

reveals that Evans' testimony about the petitioner's incriminating statements was critical to the state's case. There were no witnesses to the shooting and the murder weapon was never found. The bulk of the state's case against the petitioner was three pronged: (1) evidence that petitioner carried a particular gun on the day of the robbery that most likely fired the fatal bullets; (2) testimony by co-defendant Ben Wright that petitioner pulled the trigger; and (3) Evans' testimony about petitioner's incriminating statements. As petitioner points out, the evidence on petitioner's possession of the gun in question was conflicting and the testimony of Ben Wright was obviously impeachable.[8] The state also emphasizes that Evans testified only in rebuttal and for the sole purpose of impeaching McCleskey's alibi defense. But the chronological placement of Evans' testimony does not dilute its impact -- "merely" impeaching the statement "I didn't do it" with the testimony "He told me he did do it" is the functional equivalent of case in chief evidence of guilt.

For the foregoing reasons, the court concludes that petitioner's sixth amendment rights, as interpreted in Massiah, were violated by the use at trial of Evans' testimony about the petitioner's incriminating statements because those statements were deliberately elicited by an agent of the state after petitioner's indictment and in the absence of petitioner's attorney. Because the court cannot say, beyond a reasonable doubt, that the jury would have convicted petitioner without

Evans' testimony about petitioner's incriminating statements, petitioner's conviction for the murder of Officer Schlatt must be reversed pending a new trial.[9]

Unfortunately, one or more of those investigating Officer Schlatt's murder stepped out of line. Determined to avenge his death, the investigator(s) violated clearly-established case law, however artificial or ill-conceived it might have appeared. In so doing, the investigator(s) ignored the rule of law that Officer Schlatt gave his life in protecting and thereby tainted the prosecution of his killer.

B. Mooney Claim.

Petitioner's Mooney claim is based upon the state's use at trial of misleading testimony by Offie Evans, which petitioner contends violated his eighth amendment rights and his right to due process of law under the fourteenth amendment. See Mooney v. Holohan, 294 U.S. 103, 112 (1935) (criminal conviction may not be obtained using testimony known to be perjured). In particular, petitioner contends that the state failed to correct Evans' misleading testimony regarding his real interest in testifying against petitioner, regarding the circumstances surrounding his cooperation with the state, and regarding petitioner's confession of having shot Officer Schlatt. Petitioner alleges that the newly discovered statement of Offie Evans reveals these misleading elements of Offie Evans' testimony at trial.

Petitioner's allegation that the state misled the jury with Offie Evans' testimony that he was a disinterested witness is actually a restatement of petitioner's Giglio claim. The allegation that the state misled the jury with Offie Evans' testimony that he happened to inform the state of petitioner's incriminating statements, when in fact the evidence suggests that Offie Evans may have been an agent of the state, is a restatement of petitioner's Massiah claim. Consequently, only the allegations of misleading testimony regarding the actual shooting need to be addressed as allegations supportive of a separate Mooney claim.

As a preliminary matter, the failure of petitioner to raise this claim in his first federal habeas petition raises the question of abuse of the writ. Because this claim is based upon the newly discovered statement of Offie Evans, the same conclusion reached as to the Massiah claim obtains for this claim. It was not an abuse of the writ to fail to raise the Massiah claim earlier and it was not an abuse of the writ to have failed to raise this claim earlier.

However, on its merits the claim itself is unavailing. In order to prevail on this claim, petitioner must establish that the state did indeed use false or misleading evidence and that the evidence was "material" in obtaining petitioner's conviction or sentence or both. Brown v. Wainwright, 785 F.2d 1457, 1465 (11th Cir. 1986). The test for materiality is whether there is "any reasonable likelihood that the false testimony could have

affected the judgment of the jury." Id. at 1465-66 (quoting United States v. Bagley, ___ U.S. ___, 105 S.Ct. 3375, 3382 (1985) (plurality)). Petitioner's allegations of misleading testimony regarding his confession fail for two reasons.

First, no false or misleading testimony was admitted at trial. A comparison of Offie Evans' recently discovered statement and his testimony at trial reveals substantially identical testimony regarding McCleskey's confession that he saw the policeman with a gun and knew there was a choice between getting shot by the policeman or shooting the policeman. Compare Pet. Exhibit E, at 6 with Trial Tr. at 870. While Offie Evans did use the word "panic" in his written statement when describing this dilemma, the addition of this word adds nothing to the substance of the trial testimony, which conveyed to the jury the exigencies of the moment when petitioner fired upon Officer Schlatt. Second, even if the omission of this one phrase did render the testimony of Offie Evans misleading, this claim would fail because there is no reasonable likelihood that the jury's judgment regarding petitioner's guilt and his sentencing would have been altered by the addition of the phrase "panic" to otherwise substantially identical testimony.

C. Caldwell Claim.—

Petitioner's third new claim is based upon references by the prosecutor at petitioner's trial to appellate review of the jury sentencing decision and to the reduction on appeal of prior life

sentences imposed on petitioner. These references are said to have violated petitioner's eighth amendment rights and right to due process of law as guaranteed by the fourteenth amendment.

To the extent petitioner claims that the reference to the reduction of prior life sentences was constitutionally impermissible in that it led the jury to impose the death penalty for improper or irrelevant reasons, see Tucker v. Francis, 723 F.2d 1504 (11th Cir. 1984), this claim comes too late in the day. Petitioner was aware of these comments at the time he filed his first federal habeas petition but did not articulate this claim at that time. Because the state has pled abuse of the writ, petitioner must establish that the failure to raise this claim during the first federal habeas proceeding was not due to intentional abandonment or inexcusable neglect. Petitioner has offered no excuse for not raising this claim before. He was represented by competent counsel at the time and should not be heard to argue that he was unaware that these facts would support the claim for habeas relief. Indeed, this court recognized the potential for such a claim when passing upon the first federal habeas petition and concluded "it has not been raised by fully competent counsel." McCleskey v. Kemp, 580 F. Supp. at 388 n. 27.

Successive petition and abuse of the writ problems also plague this claim to the extent that petitioner is arguing that the prosecutor's reference to the appellate process somehow diminished the jury's sense of responsibility during the sentencing phase. This claim in due process terms was presented to this court by the first federal habeas petition and rejected. McCleskey v. Zant, 580 F. Supp. at 387-88 (citing inter alia Corn v. Zant, 708 F.2d 549, 557 (11th Cir. 1983)). Petitioner has offered no reason that the ends of justice would be served by re-visiting this due process claim.

Petitioner also argues that reference to the appellate process violated his eighth amendment rights. Although petitioner did not articulate this eighth amendment claim at the time of the first federal habeas proceeding, the failure to raise the claim at that time does not amount to an abuse of the writ. Only after this court ruled upon the first federal habeas petition did the Supreme Court indicate that it is a violation of the eighth amendment "to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere." Caldwell v. Mississippi, 472 U.S. 320, 328-29 (1985). This circuit has recently held that failure to raise a Caldwell claim in a first federal habeas petition filed before the decision does not amount to abuse of the writ because there has been a change in the substantive law. Adams v. Dugger, 816 F.2d 1493, 1495-96 (11th Cir. 1987) (per curiam).

Although this court must reach the merits of the Caldwell claim, the claim itself fails for the same reasons that the due process prong of this claim failed. The essential question is whether the comments likely caused the jury to attach diminished

consequences to their deliberations on the death penalty. See McCleskey v. Zant, 580 F. Supp. at 388. A review of the prosecutor's actual comments at petitioner's trial does not reveal any impermissible suggestions regarding the appellate process which would have led the jury to believe that the responsibility for imposing the death penalty rested elsewhere. As this court observed when passing upon the due process claim raised by the first petition,

> The prosecutor's arguments in this case did not intimate to the jury that a death sentence could be reviewed or set aside on appeal. Rather, the prosecutor's argument referred to petitioner's prior criminal record and the sentences he had received. The court cannot find that such arguments had the effect of diminishing the jury's sense of responsibility for its deliberations on petitioner's sentence. Insofar as petitioner claims that the prosecutor's arguments were impermissible because they had such an effect, the claim is without merit.

McCleskey v. Zant, 580 F. Supp. at 388.

D. Batson Claim.

Petitioner's final claim rests upon the alleged systematic exclusion of black jurors by the prosecutor at petitioner's trial. This exclusion is said to have violated petitioner's right to a representative jury as guaranteed by the sixth and fourteenth amendments.

This claim was not raised during the first federal habeas proceedings. However, failure to raise this claim could not be said to constitute abuse of the writ because prior to the Supreme

Court's decision in Batson v. Kentucky, ___ U.S. ___, 107 S.Ct. 708 (1987), petitioner could not have made out a prima facie claim absent proof of a pattern of using preemptory strikes to exclude black jurors in trials other than petitioner's. See id. at 710-11 (citing Swain v. Alabama, 380 U.S. 202 (1965)).

Although petitioner did not abuse the writ by failing to raise this claim earlier, the claim itself lacks merit. The holding in Batson, which allows defendants to make the prima facie showing of an unrepresentative jury by proving a systematic exclusion of blacks from their own jury, has not been given retroactive application. The Batson decision does not apply retroactively to collateral attacks "where the judgment of conviction was rendered, the availability of appeal exhausted, and the time for petition for certiorari had elapsed" before the Batson decision. Allen v. Hardy, ___ U.S. ___, 106 S.Ct. 2878, 2880 n. 1 (1986) (per curiam). Although the Allen decision did not involve a habeas petitioner subject to the death penalty, this circuit has specifically held that Batson may not be applied retroactively even to a habeas petitioner subject to the death penalty. See Lindsey v. Smith, 820 F.2d 1137, 1145 (11th Cir. 1987); High v. Kemp, 819 F.2d 988, 992 (11th Cir. 1987).

VI. OTHER MOTIONS.

Also pending before this court are petitioner's motions for discovery and for leave to exceed this court's page limits. The court presumes that the above resolution of the petitioner's various claims and the evidentiary hearing held in this case

obviate the need for any further discovery. Petitioner's motion for discovery, filed before the evidentiary hearing, does not provide any reason to think otherwise. The motion for discovery is therefore DENIED. The motion to exceed page limits is GRANTED.

VII. CONCLUSION.

In summary, the petition for a writ of habeas corpus is DENIED as to petitioner's Giglio, intentional discrimination, and Ake claims because those claims are successive and do not fall within the ends of justice exception. The petition for a writ of habeas corpus is DENIED as to petitioner's Mooney, Caldwell and Batson claims because they are without merit. Petitioner's motion for discovery is DENIED and his motion to exceed page limits is GRANTED. The petition for a writ of habeas corpus is GRANTED as to petitioner's Massiah claim unless the state shall re-try him within 120 days of the receipt of this order.

SO ORDERED, this 23rd day of December, 1987.

J. OWEN FORRESTER
UNITED STATES DISTRICT JUDGE

ENTERED ON DOCKET
DEC 24 1987

FOOTNOTES

1 Petitioner was also convicted on two counts of armed robbery and sentenced to two consecutive life sentences.

2 Another distinct ground for finding excusable neglect is a showing that the petitioner did not realize that the facts of which he had knowledge could constitute a basis for which federal habeas corpus relief could be granted. Booker v. Wainwright, 764 F.2d 1371, 1376 (11th Cir. 1985). Although "[t]he exact scope of this alternative exception to the abuse of writ doctrine lacks adequate definition," id., it would appear from the cases that it applies only when the petitioner appeared pro se in presenting the first habeas petition. See, e.g., Haley v. Estelle, 632 F.2d 1273, 1276 (5th Cir. 1980).

3 "... [W]e hold that the Baldus study does not demonstrate a constitutionally significant risk of racial bias affecting the Georgia capital-sentencing process." (Powell, J., for the majority). McCleskey v. Kemp, ___ U.S. ___, 107 S.Ct. 1759 at 1778 (1987).

4 See the discussion of McCleskey's Massiah claim infra.

5 References to the transcripts of the July 8, July 9, and August 10, 1987 hearings will be to "I TR.," "II Tr.," and "III Tr.," respectively.

6 Dissenting Justice White, joined by Clark and Harland, JJ., protested the new "constitutional rule ... barring the use of evidence which is relevant, reliable and highly probative of the issue which the trial court has before it." 377 U.S. at 208. The dissenters were "unable to see how this case presents an unconstitutional interference with Massiah's right to counsel. Massiah was not prevented from consulting with counsel as often as he wished. No meetings with counsel were disturbed or spied upon. Preparation for trial was in no way obstructed. It is only a sterile syllogism -- an unsound one, besides -- to say that because Massiah had a right to counsel's aid before and during the trial, his out-of-court conversations and admissions must be excluded if obtained without counsel's consent or presence." Id. at 209.

The dissenters highlighted the incongruity of overturning Massiah's conviction on these facts. "Had there been no prior arrangements between [the confederate] and the police, had [the confederate] simply gone to the police after the conversation had occurred, his testimony relating Massiah's statements would be readily admissible at the trial, as would a recording which he might have made of the conversation. In such event, it would simply be said that Massiah risked talking to a friend who decided to disclose what he knew of Massiah's criminal activities. But if, as occurred here, [the confederate] had been cooperating with the police prior to his meeting with Massiah, both his evidence and the recorded conversation are somehow transformed into inadmissible evidence despite the fact that the hazard to Massiah remains precisely the same -- the defection of a confederate in crime." Id. at 211.

7 Justice Rehnquist, dissenting, questioned the validity of Massiah: "The exclusion of respondent's statements has no relationship whatsoever to the reliability of the evidence, and it rests on a prophylactic application of the Sixth Amendment right to counsel that in my view entirely ignores the doctrinal foundation of that right." 447 U.S. at 289. Echoing many of the concerns expressed by Justice White in Massiah, id. at 290, Justice Rehnquist argued that "there is no constitutional or historical support for concluding that an accused has a right to have his attorney serve as a sort of guru who must be present whenever an accused has an inclination to reveal incriminating information to anyone who acts to elicit such information at the behest of the prosecution." Id. at 295-96. Admitting that the informants in Henry and in Massiah were encouraged to elicit information from the respective defendants, Justice Rehnquist "doubt[ed] that most people would find this type of elicitation reprehensible." Id. at 297.

For criticism of Henry for extending Massiah "despite that decision's doctrinal emptiness" and for giving Massiah "a firmer place in the law than it deserves," see Salzburg, Forward: The Flow and Ebb of Constitutional Criminal Procedure in the Warren and Burger Courts, 69 Geo.L.J. 151, 206-08 (1980).

8 There is some question whether Ben Wright's testimony on the fact of the murder would have been admissible at all absent corroboration by Evans' testimony. See O.C.G.A. §24-4-8 (uncorroborated testimony of an accomplice not sufficient to establish a fact). But see McCleskey v. Kemp, 753 F.2d at 885 (Wright's testimony corroborated by McCleskey's admitted participation in the robbery; corroboration need not extend to every material detail).

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9 Here, as in Massiah and Henry, the evidence is excluded and the conviction consequently reversed despite the fact that the evidence is "relevant, reliable and highly probative" of petitioner's guilt. Massiah, 377 U.S. at 208 (White, J., dissenting). There is no question that petitioner's incriminating statements to Evans were made voluntarily and without coercion. Had Evans been merely a good listener who first obtained McCleskey's confession and then approached the authorities, Evans' testimony would have been admissible. The substance of the evidence would have been no different, McCleskey's risk in speaking would have been no different, and McCleskey's counsel would have been no less absent, but the evidence would have been admissible simply because the state did not intentionally seek to obtain it. While this court has grave doubts about the historical and rational validity of the Supreme Court's present interpretation of the sixth amendment, those doubts have been articulated ably in the dissents of Justice White and Justice Rehnquist. See supra, notes 4 and 5. Until the Supreme Court repudiates its present doctrine this court will be obliged to reach the result it reaches today.

AO 72A (Rev. 8/82)

APPENDIX B

FILED IN CLERK'S OFFICE
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JAN 10 1989

Luther D. Thomas, Clerk
By: BJ Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

WARREN MC CLESKEY,	:	
Petitioner,	:	
vs.	:	CIVIL ACTION NO. 1:87-CV-1517-JOF
RALPH M. KEMP, Superintendent, Georgia Diagnostic and Classification Center,	:	
Respondent.	:	

ORDER

This matter is before the court on respondent's motion to reopen judgment. Fed. R. Civ. P. 60(b).

I. FACTS.

This petition for writ of habeas corpus was filed July 7, 1987. With the petition was a motion for stay of execution. This court granted the stay of execution verbally July 9, 1987, and in a formal order July 10, 1987. A two-day hearing was held on the petition for writ of habeas corpus July 8 and 9, 1987. The court continued the evidentiary hearing until August 10, 1987. On December 23, 1987 the court granted in part and denied in part the petition for writ of habeas corpus, and judgment was entered the same day. Respondent appealed, and petitioner cross-appealed. The judgment was stayed by the court March 9, 1988. The pending motion for relief from final judgment based on newly discovered evidence was filed May 6, 1988. The court entered an order allowing discovery until August 1, 1988 on the two issues of due

diligence and of the previously unavailable witness, Offie Evans' knowledge.

Respondent seeks to reopen the December 1987 judgment based on the present availability of Offie Evans. Evans was a witness at petitioner's trial. The evidentiary hearings on the petition for writ of habeas corpus revealed that Evans had been moved purposely to a cell adjacent to McCleskey's in order to elicit information from him. The court found that this was a violation of the Massiah doctrine. See Order, December 23, 1987. Evans did not testify at the evidentiary hearings on the habeas corpus petition.

Petitioner attempted to locate Mr. Evans during the July hearings in order for him to testify. An attorney working with petitioner's counsel made repeated phone calls to Offie Evans' sister looking for Mr. Evans. He was not able to reach Mr. Evans, but did get the address of another sister who he was supposedly staying with at the time. The attorney made repeated visits to the sister's house in order to try and find Mr. Evans. The attorney was told that Mr. Evans came by the residence every now and then but was not staying there. Stevenson Affidavit. Petitioner also hired an investigator, T. Delaney Bell, to help locate Mr. Evans. The investigator visited several addresses of both Mr. Evans and relatives, over a four-day period in June 1987. The investigator contacted family members again on July 6, 1987 and was told that they did not know where he was staying. Bell Aff. During the July 8th hearing the court noted

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that the federal marshal had tried to serve Mr. Evans at a sister's house but the sister did not know where he was. Respondent made no efforts to contact or locate Mr. Evans.

The respondent sent two letters to petitioner in the period between the July and August hearings to notify petitioner's counsel of the witnesses he would call in the August hearing. Both of those letters referred to the respondent's intent to re-call witnesses who had previously testified in the July hearings, but neither mentioned any desire or intention to call Mr. Evans as a witness. In April 1988, counsel for respondent learned that Mr. Evans was in the Fulton County Jail on other charges. Respondent now seeks to set aside the judgment in order to take the testimony of Offie Evans.

II. CONCLUSIONS OF LAW.

Petitioner has moved this court to expand the record to include: discovery conducted pursuant to the court's order of June 17, 1988; Affidavits of Stevenson, Bell and Hashimi; Docket Sheet, United States v. Offie Gene Evans, No. 28027; Sentence, Fulton Superior State Court v. Offie Evans, No. A-16523 (May 15, 1973); and a newspaper clipping, Atlanta Constitution, December 24, 1987. Petitioner's two motions are unopposed, and for good cause shown petitioner's motion to expand the record, and second motion to expand the record are GRANTED.

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Rule 60(b)[1] defines the circumstances under which a party may obtain relief from a final judgment. It should be construed in order to do substantial justice, but this does not mean that final judgment should be lightly reopened. The desirability for order and predictability in the judicial process speaks for caution in the reopening of judgments. Griffin v. Swim-Tech Corp., 722 F.2d 677 (11th Cir. 1984). The provisions of this rule must be carefully interpreted to preserve the delicate balance between the sanctity of final judgments and the "incessant command of the court's conscience that justice be done in light of all the facts." Id., citing Bankers Mortgage Company v. United States, 423 F.2d 73, 77 (5th Cir.), cert. denied, 399 U.S. 927 (1970) (emphasis in original). Rule 60(b) motions are directed to the sound discretion of the district court. Because a motion for new trial under Rule 60(b) is an extraordinary motion, the requirements of the rule must be strictly met. Seutieri v. Paige, 808 F.2d 785 (11th Cir. 1987).

A. Rule 60(b)(2).

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[1] Respondent's motion is based on Rule 60(b)(2) and (6). The rule says,

> On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons; ... (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); ... (6) any other reason justifying relief from the operation of the judgment.

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In order to succeed under 60(b)(2), a party must satisfy a five-part test: 1) the evidence must be newly discovered since the trial; 2) due diligence on the part of the movant to discover the new evidence must be shown; 3) the evidence must not be merely cumulative or impeaching; 4) the evidence must be material; and 5) the evidence must be such that a new trial would probably produce a new result. Seutieri, 808 F.2d at 793; see also, Taylor v. Texgas Corp., 831 F.2d 255 (11th Cir. 1987).

1. Newly Discovered.

Offie Evans' identity has been known to the state since the initial trial. The respondent contends this is newly discovered evidence because Evans has not been able to testify about the question which became crucial in this petition for habeas corpus; that is, the relationship between himself and the police, and whether he was directed by the authorities to elicit incriminating statements from McCleskey. Evans has given evidence at least three times in this case, in the original trial, the state habeas proceeding, and in his statement given in August 1978. Moreover, petitioner points out that in October 1981, Mr. Evans gave a deposition in the case of McCleskey's co-defendant, Bernard Depree. That deposition was filed in a federal habeas petition on behalf of Depree, in which the state was represented by respondent's present counsel. Petitioner contends that this deposition includes testimony about his contacts with the Atlanta Police while in the Fulton County Jail

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in 1978, and denials that he made police contacts until after he had spoken with Mr. McCleskey. Petitioner points out that the testimony in that deposition is contradictory to the testimony given in the deposition taken pursuant to this motion, but that the essentials are the same.

In light of the above discussion, it is apparent that Evans' testimony is not truly newly discovered but rather is merely newly produced. See, Johnson Waste Materials v. Marshal, 611 F.2d 593 (5th Cir. 1980) (checks and records which had been misplaced at time of trial were not newly discovered evidence sufficient to support 60(b)(2) motion). The fact that the essential substance of this testimony was in a previous deposition filed in the public records and known to respondent's counsel also indicates it is not newly discovered. Seutieri, 808 F.2d at 794 (evidence contained in public records at time of trial cannot be considered newly discovered evidence); Taylor, 831 F.2d at 255 (evidence cannot be newly discovered if in possession of moving pa-ty or his attorney prior to entry of judgment). Where the movant was aware of a witness's identity and knowledge of the transaction, and chose not to track him down because of the expense, the evidence is not newly discovered because he was aware of the existence of the evidence before the trial. Parrilla-Lopez v. United States, 841 F.2d 16 (1st Cir. 1988). Similarly, in this case, the government was aware of the witness's existence, identity and relationship to the transaction but did not attempt to have him testify at

trial. It is evident that Offie Evans' testimony is not truly newly discovered under the relevant authority.

2. Due Diligence.

In the June 17, 1988 order, the court noted that Respondent's "due diligence is measured by what the respondent knew at the time. That would include what the respondent knew about petitioner's efforts to locate Offie Evans. That is not necessarily the sum total of his knowledge nor do the petitioner's efforts to locate Evans relieve him of any obligation to utilize resources available to him."

Respondent contends that though he did not make any efforts to track down Offie Evans during the summer of 1987, it was apparent from the activities of the petitioner that such actions would be futile.[2] Petitioner points out that the Atlanta Bureau of Police Services has enjoyed a special relationship with Mr. Evans over the years, and that if the department had been looking for him, Mr. Evans might have made himself available or with those larger resources could have been found. Petitioner especially points to the testimony of Assistant District Attorney Russ Parker that he had no information or leads as to Evans' location, but that he "could probably find him. [I have] spent enough time with him." I Tr. 174.

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[2] It appears that respondent's knowledge of petitioner's efforts to locate Evans came only from petitioner's counsel's statements at the evidentiary hearings.

Discovery pursuant to this motion reveals that respondent made no efforts to locate Evans during the summer of 1987. See, Respondent's Answer to First Interrogatories of Petitioner, No. 1. Respondent now contends that the deposition of Evans shows that he was outside of Atlanta, and respondent would not have been able to locate him anyway. However, the affidavits of petitioner's assistants show that Evans' relatives had seen him at various times during petitioner's search for him. Therefore, it is unclear where exactly Mr. Evans was at the time and whether or not he could have been found. Moreover, it is not good enough merely to say that it would be impossible to find the evidence. Due diligence is measured by respondent's knowledge and actions. The standard under 60(b)(2) is that the movant exercise due diligence in order to find the relevant evidence before entry of judgment. Respondent relied on petitioner's actions in seeking Mr. Evans, but made no efforts of his own. As the court previously noted, petitioner's efforts did not relieve respondent of any obligation to utilize his own resources to locate Evans. Movant has not demonstrated the due diligence prong of the 60(b)(2) standard.

3. Evidence is Not Cumulative or Impeaching; Materiality.

Evans' deposition testimony essentially asserts that he was not moved intentionally to be placed next to McCleskey, and in fact was not moved at all, and was not an informant. His testimony goes directly to the issue involved, and therefore is

material. However, there are numerous internal contradictions within the deposition, and contradictions with Evans' previous statements, or the statements of other witnesses. Also, it is clear that Mr. Evans has his own motives for denying his status as an informant. He expressed concern several times during his deposition about newspaper accounts which had labeled him an informant, because that kind of information could get a man killed. Evans Depo., p. 25.

4. Likelihood of Producing a Different Result.

It is unlikely Evans' testimony would produce a different result. The credibility or believability problems with his testimony are evident. He has a strong motivation for saying he was not an informant, not only because of recriminations from his associates, but also in order to stay in favor with the police and prosecutors who have used him to testify in the past. The numerous contradictions within his deposition also lead the court to the conclusion that his testimony would not be believable. See Petitioner's Brief in Response to Respondent's Supplement to Rule 60(b) Motion. In finding a Massiah violation, the court relied on the testimony of Officer Ulysses Worthy that someone requested his permission to move Evans to be near McCleskey, Order, December 23, 1987, p. 18, even in the face of other law enforcement personnel who denied requesting that Evans be moved or having any knowledge of such a request. Order, p. 19. The court relied on Worthy's testimony and noted that "[t]he lack of corroboration by other

witnesses is not surprising; the other witnesses, like Assistant District Attorney Parker, had no reason to know of a request to move Evans or, like Detective Dorsey, had an obvious interest in concealing any such arrangement. Worthy, by contrast, had no apparent interest or bias that would explain any conscious deception." Order, p. 22. Therefore, Evans' testimony is not likely to change the credibility of Worthy's testimony or the fact that petitioner showed by a preponderance of the evidence that a Massiah violation occurred.

Therefore, for the above reasons, respondent's motion under 60(b)(2) is DENIED.

B. Rule 60(b)(6).

Rule 60(b)(6) grants federal courts broad authority to relieve a party from a final judgment "upon such terms as are just" provided the motion is made within a reasonable time and is not premised on one of the grounds in (b)(1) through (b)(5). Liljeberg v. Health Services Acquisition Corp., ___ U.S. ___, 56 U.S.L.W. 4637, 4642 (1988). This ground should be applied only in exceptional circumstances. Id. The party seeking relief under 60(b)(6) has the burden of showing that absent such relief, an extreme and unexpected hardship will result. Griffin, 722 F.2d at 680. Respondent contends that in the unusual circumstances of this case, it would serve the ends of justice to reopen judgment under 60(b)(6). However, respondent has shown no exceptional circumstances outside those discussed in the Rule 60(b)(2) motion. There is little likelihood that if

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this motion is denied an extreme hardship will result to respondent. Therefore, respondent's motion under Rule 60(b)(6) is DENIED.

III. CONCLUSION.

In sum, petitioner's two motions to expand record are GRANTED. Respondent's motion for relief from final judgment is DENIED.

SO ORDERED this 6th day of January, 1989.

J. Owen Forrester

J. OWEN FORRESTER
UNITED STATES DISTRICT JUDGE

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BY DEPUTY CLERK

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APPENDIX C

jury's recommendation of life imprisonment when balanced against the several aggravating factors. The supreme court determined that the jury was made aware of the victim's reputation for violence, *Lusk II*, 498 So.2d at 905, and that the jury's recommendation "was not based on any valid mitigating factor discernible from the record." *Lusk I*, 446 So.2d at 1043. That court further determined from a review of the record that the trial judge "did not ignore evidence presented by Lusk in mitigation," but found it "clear that the trial judge did not believe that said evidence in its totality rose to the level of mitigation in Lusk's case." *Id.* The state supreme court thus held that the dictates of *Tedder* had been satisfied.

The state trial court acknowledged that it considered the mitigating evidence offered by Lusk in his trial, as did the Supreme Court of Florida. This court may examine the application of Florida's jury override scheme, *Parker v. Dugger*, 876 F.2d 1470, 1474 (11th Cir.1989), but we may not second-guess the state courts regarding whether the trial court "complied with the mandates of *Tedder*." *Id.* at 1475. It is not our function to decide whether we agree with the advisory jury or with the trial judge and the Supreme Court of Florida. Our review, rather, is limited to ascertaining whether the *result* of the override scheme is arbitrary or discriminatory. *Spaziano v. Florida*, 468 U.S. 447, 465, 104 S.Ct. 3154, 3165, 82 L.Ed.2d 340 (1984). Lusk contends that we should grant only limited deference to state override proceedings. On the contrary, to the extent that those proceedings do not produce an arbitrary or discriminatory result, the Constitution is not violated, and we will not second-guess the state courts on a matter of state law. The state courts concluded that there were no *reasonable* bases for the jury's recommendation despite the fact that both the jury as advisor and the judge as sentencer were made aware of mitigating factors. On the facts of this case, we do not find that the result of the application of *Tedder* was arbitrary or irrational.

IV. *Conclusion*

Because it granted relief as to the sentence on the basis of the jury override, the district court did not address other claims asserted by Lusk which challenge his sentence.[9] While we could address those claims, *see Lindsey v. Smith*, 820 F.2d 1137 (11th Cir.1987), we conclude that a proper exercise of our discretion in this case, given the nature of the claims and the issues presented, is to remand them to the district court so that the district court may address them in the first instance. The judgment of the district court is REVERSED to the extent that it grants relief on the jury override issue and AFFIRMED on all other issues. The case is REMANDED to the district court for consideration of the claims that court has not yet addressed.

Warren McCLESKEY, Petitioner-Appellee,

v.

Walter ZANT, Superintendent, Georgia Diagnostic and Classification Center, Respondent-Appellant.

Nos. 88-8085, 89-8085.

United States Court of Appeals, Eleventh Circuit.

Nov. 22, 1989.

As Amended Dec. 13, 1989.

After defendant's convictions and sentences for murder and two counts of armed

9. These claims are: (1) that Lusk's death sentence violated the Eighth Amendment because it was based on the unconstitutionally vague statutory aggravating circumstance that the murder was "especially heinous, atrocious or cruel;" (2) that the Florida death penalty statute improperly shifted the burden of proof to the defendant to show that mitigating circumstances outweighed aggravating circumstances; (3) that Lusk was denied due process because counsel failed to review the presentence report with him prior to sentencing and because the trial court failed to ascertain whether Lusk had reviewed the report; and (4) that Lusk's Eighth Amendment rights were violated because the state trial judge believed that he was barred from considering notions of mercy in his sentencing decision.

robbery were affirmed by the Georgia Supreme Court, 245 Ga. 108, 263 S.E.2d 146, defendant petitioned for habeas corpus relief. The United States District Court for the Northern District of Georgia, Nos. 87-CV-1517, 1:87-CV-1517-JOF, J. Owen Forrester, J., granted relief, 580 F.Supp. 338, and appeal was taken. The Court of Appeals, 753 F.2d 877, reversed. After the United States Supreme Court, 481 U.S. 279, 107 S.Ct. 1756, 95 L.Ed.2d 262, affirmed, defendant filed second habeas petition. The District Court granted relief, and State appealed. The Court of Appeals, Kravitch, Circuit Judge, held that: (1) petitioner abused writ by deliberately abandoning his Sixth Amendment *Massiah* claim, and (2) any error based on alleged *Massiah* violation was harmless.

Reversed.

1. Habeas Corpus ⇐898(1)

Under doctrine of "abuse of writ," federal court may decline to entertain second or subsequent habeas corpus petition that raises claim that petitioner did not raise in prior petition. 28 U.S.C.A. § 2244(b); Rules Governing § 2254 Cases, Rule 9(b), 28 U.S.C.A. foll. § 2254.

See publication Words and Phrases for other judicial constructions and definitions.

2. Habeas Corpus ⇐897, 898(1)

"Successive petition" is one that raises claim already adjudicated through prior habeas petition, while petition that raises grounds for relief not raised in prior petition is analyzed as "abuse of the writ." 28 U.S.C.A. § 2244(b); Rules Governing § 2254 Cases, Rule 9(b), 28 U.S.C.A. foll. § 2254.

See publication Words and Phrases for other judicial constructions and definitions.

3. Habeas Corpus ⇐899

State has burden of pleading that habeas petitioner has abused the writ. Rules Governing § 2254 Cases, Rule 9(b), 28 U.S.C.A. foll. § 2254.

4. Habeas Corpus ⇐898(2)

Once state has alleged abuse of the writ, habeas petitioner must be afforded opportunity to justify his or her previous failure to raise claim. Rules Governing § 2254 Cases, Rule 9(b), 28 U.S.C.A. foll. § 2254.

5. Habeas Corpus ⇐899

If court determines that habeas petitioner has failed to carry burden of disproving abuse of the writ, it may dismiss petition unless ends of justice demand that court reach merits. Rules Governing § 2254 Cases, Rule 9(b), 28 U.S.C.A. foll. § 2254.

6. Habeas Corpus ⇐899

Whether second or subsequent habeas petition is to be dismissed on abuse of the writ grounds is left to sound discretion of district court; discretion in such matters is not unfettered, however, and its sound exercise will rarely permit district court to hear petition that clearly constitutes abuse of the writ. Rules Governing § 2254 Cases, Rule 9(b), 28 U.S.C.A. foll. § 2254.

7. Habeas Corpus ⇐898(3)

Habeas petitioner abused writ by deliberately abandoning his Sixth Amendment *Massiah* claim when he raised claim in initial state habeas petition, then failed to raise claim in his first federal habeas petition, although defendant was unaware of evidence supporting claim until he filed second federal habeas petition; counsel had some factual basis for raising claim in state habeas petition, and failed to raise claim in first federal petition after initial investigatory efforts proved unsuccessful. 28 U.S.C.A. § 2244(b); Rules Governing § 2254 Cases, Rule 9(b), 28 U.S.C.A. foll. § 2254; U.S.C.A. Const.Amend. 6.

8. Habeas Corpus ⇐898(3)

Abandoning claim after initial investigatory efforts prove unsuccessful cannot insulate habeas petitioner from abuse of the writ. 28 U.S.C.A. § 2244(b); Rules Governing § 2254 Cases, Rule 9(b), 28 U.S.C.A. foll. § 2254.

9. Habeas Corpus ⇐898(3)

Habeas petitioner and his or her counsel may not circumvent abuse of the writ doctrine by failing to follow through with investigation and then later claiming that claim could not have succeeded earlier on facts as then known. 28 U.S.C.A. § 2244(b); Rules Governing § 2254 Cases, Rule 9(b), 28 U.S.C.A. foll. § 2254.

10. Criminal Law ⇐394.1(2)

Remedy for *Massiah* violation is not automatic reversal of conviction, but rather exclusion of evidence tainted by violation of defendant's right to counsel. U.S.C.A. Const.Amend. 6.

11. Habeas Corpus ⇐490(3)

Any error based on alleged *Massiah* violation, occurring when inmate testified in murder prosecution that defendant made "jailhouse confession" in which he admitted that he shot police officer during robbery, was harmless, in view of other evidence indicating defendant's guilt, including statements of codefendant, and defendant's confession to his participation in robbery. U.S.C.A. Const.Amend. 6.

Mary Beth Westmoreland, Asst. Atty. Gen., Susan V. Boleyn, William B. Hill, Atlanta, Ga., for respondent-appellant.

Robert H. Stroup, Atlanta, Ga., Julius L. Chambers, NAACP Legal Defense Fund, James M. Nabrit, II, John Charles Boger, New York City, for petitioner-appellee.

Appeals from the United States District Court for the Northern District of Georgia.

Before KRAVITCH and EDMONDSON, Circuit Judges, and RONEY, Senior Circuit Judge.

KRAVITCH, Circuit Judge:

This is a consolidated appeal by the State of Georgia from the district court's grant of Warren McCleskey's second petition for a writ of habeas corpus and from the district court's denial of the State's motion under Fed.R.Civ.P. 60(b) for relief from the judgment. The district court granted the writ solely on the basis of McCleskey's claim that his sixth amendment rights had been violated under *Massiah v. United States*, 377 U.S. 201, 84 S.Ct. 1199, 12 L.Ed.2d 246 (1964). Because we find that the district court abused its discretion in failing to dismiss McCleskey's *Massiah* allegation as an abuse of the writ, we reverse the district court without reaching the merits of McCleskey's *Massiah* claim or of the State's Rule 60(b) motion.

I. FACTS[1]

McCleskey was arrested and charged with the murder of a police officer during an armed robbery of the Dixie Furniture Store. The store was robbed by four men. Three entered through the back door and one through the front. Each of the four men was armed. McCleskey had a .38 caliber Rossi white-handled, nickel-plated pistol, Ben Wright had a sawed-off shotgun, and the other two had blue steel pistols. The man who entered through the front secured the store, forcing the employees to lie on the floor. The others rounded up the employees in the rear and began to tie them up with tape. The manager was forced at gunpoint to turn over the store receipts, his watch, and six dollars. Responding to a silent alarm, a police officer entered the store by the front door. He proceeded approximately fifteen feet down the center aisle. Two shots were fired. One shot struck the police officer in the head causing his death. The other shot glanced off a pocket lighter in the officer's pocket and lodged in a sofa. That bullet was recovered. The robbers fled. Sometime later, McCleskey was arrested in connection with another armed robbery.

McCleskey was identified by two of the store personnel as the robber who came in the front door. Shortly after his arrest, McCleskey confessed to participating in the robbery, but maintained that he was not the triggerman. One of his accomplices, Ben Wright, testified that McCleskey ad-

1. The statement of facts is taken from the Georgia Supreme Court's opinion on direct appeal, *McCleskey v. The State*, 245 Ga. 108, 263 S.E.2d 146 (1980).

mitted to shooting the officer. Offie Evans, a jail inmate housed near McCleskey testified that McCleskey made a "jail house confession" in which he claimed he was the triggerman. The police officer was killed by a bullet fired from a .38 caliber Rossi handgun. Though the weapon was not recovered, McCleskey had stolen a .38 caliber Rossi in a holdup of a Red Dot grocery store two months earlier.

II. PRIOR PROCEEDINGS

The jury convicted McCleskey of murder and two counts of armed robbery. It sentenced McCleskey to death for the murder of the police officer and to consecutive life sentences for the two robbery counts. In 1980, these convictions and sentences were affirmed by the Georgia Supreme Court, *McCleskey v. State*, 245 Ga. 108, 263 S.E.2d 146, *cert. denied*, 449 U.S. 891, 101 S.Ct. 253, 66 L.Ed.2d 119 (1980). In January of 1981, McCleskey petitioned for habeas corpus relief in the Superior Court of Butts County, asserting over twenty challenges to his conviction and sentence. In an amendment to his petition, McCleskey alleged a *Massiah* violation, claiming that the introduction into evidence of statements he made to an informer violated his rights under the sixth amendment. *See Massiah v. United States*, 377 U.S. 201, 84 S.Ct. 1199. The petition was denied after an evidentiary hearing and the Georgia Supreme Court denied McCleskey's application for a certificate of probable cause to appeal. The United States Supreme Court denied McCleskey's petition for certiorari. *McCleskey v. Zant*, 454 U.S. 1093, 102 S.Ct. 659, 70 L.Ed.2d 631 (1981).

McCleskey filed his first federal habeas petition in district court in December of 1981, asserting eighteen grounds for granting the writ. That petition did *not* include a claim under *Massiah*. It did, however, include a claim under *Giglio v. United States*, 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972), alleging that the state prosecutor had failed to reveal that Offie Evans, one of its witnesses, had been promised favorable treatment as a reward for his testimony. In 1984, the district court granted habeas corpus relief as to McCleskey's *Giglio* claim. It ordered that his conviction and sentence for malice murder be set aside, but affirmed his convictions and sentences for armed robbery. *McCleskey v. Zant*, 580 F.Supp. 338 (N.D.Ga. 1984).

Both parties appealed and in 1985, the Eleventh Circuit, sitting *en banc*, reversed the district court's grant of the writ on the *Giglio* claim and affirmed on all claims denied by the district court. *McCleskey v. Kemp*, 753 F.2d 877 (11th Cir.1985) (en banc). McCleskey then filed a petition for a writ of certiorari in the Supreme Court of the United States. The Supreme Court granted certiorari limited to consideration of the application of the Georgia death penalty and affirmed the Eleventh Circuit. *McCleskey v. Kemp*, 481 U.S. 279, 107 S.Ct. 1756, 95 L.Ed.2d 262, *petition for rehearing denied*, 482 U.S. 920, 107 S.Ct. 3199, 96 L.Ed.2d 686 (1987).

McCleskey filed a subsequent petition for a writ of habeas corpus in state court in June of 1987. In an amendment to that petition, McCleskey once again raised a *Massiah* claim, alleging that newly discovered evidence demonstrated that a jail inmate of McCleskey's was acting on behalf of the State as an informant. The state court granted the State's motion to dismiss and the Georgia Supreme Court denied McCleskey's application for a certificate of probable cause.

McCleskey filed the present petition for a writ of habeas corpus in federal district court in July of 1987. After evidentiary hearings on the petition in July and August of 1987, the district court entered an order granting habeas corpus relief only as to McCleskey's murder conviction and sentence based upon the finding of a *Massiah* violation. *McCleskey v. Kemp*, No. C87-1517A (N.D.Ga. Dec. 23, 1987).

The State now appeals the district court's grant of the writ, claiming that the district court abused its discretion in failing to dismiss McCleskey's *Massiah* allegation as an abuse of the writ and that the district court erred in finding a violation of *Massiah*.[2]

III. ABUSE OF THE WRIT

A. *Background*

[1] Under the doctrine of "abuse of the writ," a federal court may decline to entertain a second or subsequent habeas corpus petition that raises a claim that the petitioner did not raise in a prior petition. The doctrine is grounded in the court's equitable power to decline to entertain a habeas corpus petition properly within its jurisdiction when "a suitor's conduct in relation to the matter at hand ... disentitle[s] him to the relief he seeks." *Sanders v. United States*, 373 U.S. 1, 17, 83 S.Ct. 1068, 1078, 10 L.Ed.2d 148 (1963) (quoting *Fay v. Noia*, 372 U.S. 391, 438, 83 S.Ct. 822, 849, 9 L.Ed.2d 837 (1963)).

[2] The statutory basis for the doctrine of abuse of the writ in cases of successive petitions for habeas corpus can be found at 28 U.S.C. § 2244(b)[3] and Rule 9(b) of the Rules Governing Section 2254 Cases in the United States District Courts.[4] These provisions address the problem of prisoners filing the same claims in successive petitions as well as the problem of prisoners who abuse the writ by filing their claims piecemeal. A "successive petition" is one that raises a claim already adjudicated through a prior petition, while a petition that raises grounds for relief not raised in the prior petition is analyzed as an "abuse of the writ." *See Gunn v. Newsome*, 881 F.2d 949, 955 n. 6 (11th Cir.1989) (en banc) (plurality opinion), *petition for cert. filed*, No. 89-611, 1989 WL 129621 (Oct. 16, 1989).

A federal court's decision to exercise its equitable power to dismiss a petition is based on different considerations in the two types of cases. In cases of successive petitions, equity usually will not permit a petitioner to reassert a claim resolved against him "in the hope of getting before a different judge in multijudge courts." *See* Sec. 2254 Cases R. 9 advisory committee's note. In cases of abuse of the writ, equity counsels against allowing "needless piecemeal litigation" or "collateral proceedings whose only purpose is to vex, harass, or delay." *Sanders*, 373 U.S. at 18, 83 S.Ct. at 1078. In both instances, the need for finality in criminal law counsels strongly against courts repeatedly reviewing criminal convictions. *See Kuhlmann v. Wilson*, 477 U.S. 436, 452-53, 106 S.Ct. 2616, 2626-27, 91 L.Ed.2d 364 (1986) (plurality opinion).

[3] The state has the burden of pleading that the habeas petitioner has abused the writ. *Price v. Johnston*, 334 U.S. 266, 291-92, 68 S.Ct. 1049, 1063, 92 L.Ed. 1356 (1948). This circuit has held that "[t]he state carries its burden by recounting the petitioner's writ history, identifying the claims not raised before the instant petition

2. This court stayed the briefing schedule of the appeal pending the State's filing in district court of a motion under Fed.R.Civ.P. 60(b) for relief from the judgment based on the availability of witness Offie Evans. The district court denied the motion and this court granted the State's motion to consolidate the State's original appeal and its appeal from the denial of the motion for relief from the judgment.

3. 28 U.S.C. § 2244(b) states as follows:
When after an evidentiary hearing on the merits of a material factual issue, or after a hearing on the merits of an issue of law, a person in custody pursuant to the judgment of a State court has been denied by a court of the United States or a justice or judge of the United States release from custody or other remedy on an application for a writ of habeas corpus, a subsequent application for a writ of habeas corpus in behalf of such person need not be entertained by a court of the United States or a justice or judge of the United States unless the application alleges and is predicated on a factual or other ground not adjudicated on the hearing of the earlier application for the writ, and unless the court, justice, or judge is satisfied that the applicant has not on the earlier application deliberately withheld the newly asserted ground or otherwise abused the writ.

4. Rule 9(b) provides as follows:
Successive Petitions. A second or successive petition may be dismissed if the judge finds that it fails to allege new or different grounds for relief and the prior determination was on the merits or, if new and different grounds are alleged, the judge finds that the failure of the petitioner to assert those grounds in a prior petition constituted an abuse of the writ.

and alleging that the petitioner abused the writ in violation of 28 U.S.C. § 2254, Rule 9(b)." *Booker v. Wainwright*, 764 F.2d 1371, 1376 (11th Cir.1985), *cert. denied*, 474 U.S. 975, 106 S.Ct. 339, 88 L.Ed.2d 324 (1985). The State has clearly met its burden here, as it is evident that McCleskey did not assert his *Massiah* claim in his first federal habeas petition.

[4, 5] McCleskey's previous failure to assert the claim does not, however, require the federal court to dismiss his petition, for the courts have recognized that "not all piecemeal litigation is needless." *Booker v. Wainwright, id.; see also Haley v. Estelle*, 632 F.2d 1273, 1276 (5th Cir.1980).[5] Once the state has alleged abuse of the writ, the petitioner must be afforded the opportunity to justify his previous failure to raise the claim. In deciding whether a petitioner has presented sufficient justification, courts have required the petitioner to show that he did not deliberately abandon the claim and that his failure to raise it was not due to inexcusable neglect. *See Woodard v. Hutchins*, 464 U.S. 377, 379, 104 S.Ct. 752, 753, 78 L.Ed.2d 541 (1984) (per curiam) (Powell, J., concurring, joined by four other justices); *Demps v. Dugger*, 874 F.2d 1385, 1391 (11th Cir.1989), *petition for cert. filed*, No. 89-5277, 1989 WL 113448 (Aug. 4, 1989); *Witt v. Wainwright*, 755 F.2d 1396, 1397 (11th Cir.), *cert. denied*, 470 U.S. 1039, 105 S.Ct. 1415, 84 L.Ed.2d 801 (1985); *Potts v. Zant*, 638 F.2d 727, 740–41 (5th Cir. Unit B 1981), *cert. denied*, 454 U.S. 877, 102 S.Ct. 357, 70 L.Ed.2d 187 (1981).[6] If a court determines that the petitioner has failed to carry his burden of disproving an abuse of the writ, it may dismiss the petition unless the ends of justice demand that the court reach the merits. *Sanders*, 373 U.S. at 16–19, 83 S.Ct. at 1078–79; *Demps v. Dugger*, 874 F.2d at 1391; *Davis v. Kemp*, 829 F.2d 1522, 1526 (11th Cir.1987), *cert. denied*, — U.S. —, 108 S.Ct. 1099, 99 L.Ed.2d 262 (1988).

[6] Whether a second or subsequent petition is to be dismissed on abuse of the writ grounds is left to the sound discretion of the district court. *Sanders*, 373 U.S. at 18, 83 S.Ct. at 1079; *Darden v. Dugger*, 825 F.2d 287, 294 (11th Cir.1987), *cert. denied*, — U.S. —, 108 S.Ct. 1125, 99 L.Ed.2d 285 (1988); *Potts v. Zant*, 638 F.2d at 741. Yet discretion in such matters is not unfettered, and its sound exercise will rarely permit a district court to hear a petition that clearly constitutes an abuse of the writ. *See Gunn v. Newsome*, 881 F.2d at 949.

In the instant appeal, the district court found that McCleskey could not be said to have intentionally abandoned his claim. We disagree and find that the district court abused its discretion in failing to dismiss a clearly abusive petition.

B. *Deliberate Abandonment of the Massiah Claim*

[7] McCleskey asserts that his failure to raise a *Massiah* claim in his earlier federal petition is justified because at the time he filed that petition, he lacked the evidence to support such a claim. To demonstrate a violation of sixth amendment rights under *Massiah v. United States*, 377 U.S. 201, 84 S.Ct. 1199, a defendant must show that the prosecution deliberately elicited incriminating statements from him in the absence of his lawyer. *Massiah* itself involved statements made by a defendant free on bail to a co-indictee in a car that had been wired by the government. In *United States v. Henry*, 447 U.S. 264, 100 S.Ct. 2183, 65 L.Ed.2d 115 (1980), the Supreme Court applied *Massiah* to a situation in which incriminatory statements were made to a cellmate who was a government informant. In *Kuhlmann v. Wilson*, the Supreme Court stressed that a defendant alleging a *Massiah* violation "must demonstrate that the police and their informant

5. In *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir.1981) (en banc), this court adopted as binding precedent all decisions of the former Fifth Circuit handed down before October 1, 1981.

6. In *Stein v. Reynolds Securities, Inc.*, 667 F.2d 33 (11th Cir.1982), this court adopted as binding precedent all decisions of Unit B of the former Fifth Circuit handed down after September 30, 1981.

took some action, beyond merely listening, that was designed deliberately to elicit incriminating remarks." 477 U.S. at 459, 106 S.Ct. at 2630.[7]

McCleskey bases his *Massiah* claim on two pieces of evidence. The first is a 21-page written statement of Offie Evans, a prisoner who was incarcerated in the cell next to McCleskey's when McCleskey was in the Fulton County Jail awaiting trial. Evans testified against McCleskey at trial, relating several incriminating statements made by McCleskey. The written statement, which had been given to the Atlanta Police Department in August of 1978, sets out these conversations in great detail, demonstrating that Evans lied to McCleskey in order to get information from him.[8] McCleskey argues that the written statement shows evidence of an *ab initio* relationship between Evans and the prosecution and is thus highly relevant to his *Massiah* claim.

The second piece of evidence McCleskey uses to support his *Massiah* claim is the testimony of Ulysses Worthy who was captain of the day watch at the Fulton County Jail during the summer of 1978. Worthy testified at two separate points during the district court hearings on McCleskey's second habeas petition. Though Worthy's testimony was at times confused and contradictory, the district court credited Worthy's assertion that at some point some officer involved with the case had asked that Evans be moved to a different cell. The district court judge relied heavily on Worthy's testimony in holding that McCleskey had presented a valid *Massiah* claim. In fact, he found that "[t]he lack of corroboration by other witnesses is not surprising; the other witnesses, like Assistant District Attorney Parker, had no reason to know of a request to move Evans or, like Detective Dorsey, had an obvious interest in concealing any such arrangement. Worthy, by contrast, had no apparent interest or bias that would explain any conscious deception." *McCleskey*, No. C87-1517A, slip op. at 22.

McCleskey maintains that he was unaware of both pieces of evidence critical to his *Massiah* claim until well after he filed his first federal habeas petition. It is uncontested that he did not obtain Evans' statement until July of 1987 and that he did not know about the existence of Worthy until the time of the hearing on the second federal habeas petition. The State strongly contends that habeas counsel realized or should have realized that Evans had made a written statement concerning his conversations with McCleskey and asserts that petitioner's counsel should have made some effort to obtain that statement. The district court found, however, that McCleskey was not in fact aware of the written statement, and we cannot say that this determination is clearly erroneous.

Assuming that McCleskey was unaware of both pieces of evidence, the question before us is whether McCleskey's unawareness of the *factual* bases for his *Massiah* claim at the time of his first federal habeas petition is sufficient to justify his failure to present the claim. The district court found that it was sufficient, holding that McCleskey's unawareness precluded a finding of deliberate abandonment of the claim, despite the fact that McCleskey had raised it in his first state habeas petition. We disagree.

In finding that McCleskey did not deliberately abandon his *Massiah* claim, the district court stated that:

> First petitioner cannot be said to have intentionally abandoned this claim. Although petitioner did raise a *Massiah* claim in his first state petition, that claim was dropped because it was obvious that

7. In *Lightbourne v. Dugger*, 829 F.2d 1012 (11th Cir.1987), *cert. denied*, — U.S. —, 109 S.Ct. 329, 102 L.Ed.2d 346 (1988), this circuit characterized petitioner's burden in a *Massiah/Henry* claim as one involving two elements: "In order to establish a violation of the Sixth Amendment in a jailhouse informant case, the accused must show (1) that a fellow inmate was a government agent; and (2) that the inmate deliberately elicited incriminating statements from the accused." *Id.* at 1020.

8. For instance, Evans told McCleskey that his name was Charles, that he was the uncle of codefendant Ben Wright, and that he was supposed to be a participant in the robbery himself.

it could not succeed given the then-known facts. At the time of his first federal petition, petitioner was unaware of Evans' written statement, which, as noted above, contains strong indications of an *ab initio* relationship between Evans and the authorities. Abandoning a claim whose supporting facts only later become evident is not an abandonment that "for strategic, tactical, or any other reasons ... can be described as the deliberate by-passing of state procedures." ... Petitioner's *Massiah* claim is therefore not an abuse of the writ on which no evidence should have been taken. This is not a case where petitioner has reserved his proof or deliberately withheld his claim for a second petition.... Nor is the petitioner now raising an issue identical to one he earlier considered without merit.

McCleskey, No. C87-1517A, slip op. at 24 (citations omitted).

This holding by the district court misconstrues the meaning of deliberate abandonment. McCleskey included a *Massiah* claim in his first state petition, dropped it in his first federal petition, and now asserts it again in his second federal petition.[9] Given that McCleskey had asserted the *Massiah* claim in his first state habeas petition, it is clear that the issue was not unknown to him at the time of his first federal petition. Further, we must assume that at the time McCleskey filed his first state habeas petition, counsel had determined that there was some factual basis for a *Massiah* claim. Indeed, such a determination is not surprising. Not only was counsel aware that Evans was in a cell next to McCleskey,[10] but counsel was also aware that some sort of relationship existed between Evans and the police, as this formed the basis of McCleskey's *Giglio* claim.[11] The petitioner and his counsel did not accidentally fail to include the *Massiah* claim in the federal petition, but made a knowing choice not to pursue the claim after having raised it previously. This constitutes prima facie evidence of deliberate abandonment. In *Darden v. Dugger*, we stated that:

> The record shows that the issue presented in this third petition was specifically withdrawn from the district court's consideration as being not well founded. The issue was abandoned. Intentional abandonment of a claim is precisely the context that application of the concept of abuse of the writ is intended to address. *Witt*, 755 F.2d at 1397. Petitioner may be deemed to have waived his right to a hearing on a successive application for federal habeas relief when he deliberately abandons one of his grounds at the first hearing.

825 F.2d at 294.

When asked at the second federal habeas hearing why he did not pursue the *Massiah* claim in his first federal petition, counsel responded that his efforts to find evidence in support of the claim had failed. It appears, however, that these efforts were somewhat lacking. Counsel testified that he informally attempted to contact jailers at the Fulton County Jail, but that they could provide him with no information.[12]

9. In an amendment to his first state petition, McCleskey alleged that:

> The introduction into evidence of petitioner's statements to an informer, elicited in a situation created to induce the petitioner to make incriminating statements without assistance of counsel, violated the petitioner's right to counsel under the Sixth Amendment to the Constitution of the United States and Section 2-111 of the 1976 Constitution of the State of Georgia.

10. Evans testified at trial as to certain statements that McCleskey had made in prison.

11. In *Giglio v. United States*, 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972), the Supreme Court held that the state violates due process when it obtains a conviction on the basis of a witness's testimony when the witness has failed to disclose a promise of favorable treatment from the prosecution. McCleskey included a *Giglio* claim in his first state and first federal habeas petitions.

12. At his second federal habeas hearing, the lawyer who represented McCleskey at the first federal habeas hearing testified that he "spoke with a couple of Atlanta Bureau of Police Services Officers" in order to find out how to develop factual evidence in support of a claim. Pursuant to their suggestion, counsel spoke with two or three persons who were deputies at the Fulton County Jail. He testified that "none of them had any information. Basically they had no recollection of the circumstances regarding how Evans came to be assigned to the jail cell that he was assigned to or of any conversations with the Atlanta Bureau of Police Services Detectives regarding Offie Evans' assignment to that jail cell."

Counsel apparently made no attempt to contact persons who clearly had contact with Evans and McCleskey at the Fulton County Jail. He testified that he did not speak to Detective Dorsey (mentioned by Evans in his testimony at the first state habeas hearing), to Detectives Jowers or Harris (officers who had investigated the McCleskey case), or Deputy Hamilton (who testified at trial regarding his contact with Mr. Evans).

He also noted that at a deposition taken for the first state habeas hearing, Russell Parker, the District Attorney prosecuting the case, claimed that he was unaware of any instance in which Evans had worked for the Atlanta Police Department prior to his overhearing conversations at the Fulton County Jail. Counsel testified that he did not carry the *Massiah* claim over into the federal habeas petition because he "looked at what we had been able to develop in support of the claim factually in the state habeas proceeding and made the judgment that we didn't have the facts to support the claim and, therefore, did not bring it into federal court."

[8] Abandoning a claim after initial investigatory efforts prove unsuccessful cannot insulate a petitioner from abuse of the writ. *See Witt v. Wainwright*, 755 F.2d at 1397 (insufficient to allege that evidence was not available if it was within petitioner's power to elicit such evidence at time of earlier petition); *Woodard v. Hutchins*, 464 U.S. 377, 379 & n. 3, 104 S.Ct. 752, 753 & n. 3, 78 L.Ed.2d 541 (1984) (per curiam) (Powell, J., concurring, joined by four other justices) (petitioner found to have abused the writ when he is unable to explain why examination providing evidence of insanity was not conducted earlier); *Antone v. Dugger*, 465 U.S. 200, 205 & n. 3, 206, 104 S.Ct. 962, 964 & n. 3, 965, 79 L.Ed.2d 147 (1984) (per curiam) (haste with which first habeas petition prepared does not require courts to consider claims withheld from that petition if substance could have been presented in first petition).

[9] McCleskey places great emphasis on the fact that the State allegedly withheld Evans' 21-page statement from both trial and habeas counsel. The statement was ultimately obtained in June of 1987 through a request pursuant to the Georgia Open Records Act, O.C.G.A. § 50-18-72(a). It is clear, however, that the statement itself does not demonstrate the existence of a *Massiah* violation. At most, it was simply the catalyst that caused counsel to pursue the *Massiah* claim more vigorously. The key piece of evidence supporting McCleskey's *Massiah* claim was the testimony of Worthy, who testified for the first time at the second federal habeas hearing in July of 1987. Counsel claims that he did not discover Worthy until he engaged in a "massive, indiscriminate effort to subpoena everyone whose name was mentioned in any document." McCleskey has not presented any reason why counsel would have been unable to contact Ulysses Worthy back in 1981 when the first federal habeas petition was filed. Nor has he shown that a more extensive effort at that time to track down persons with information as to what transpired in the county jail during the summer of 1978 would not have turned up Worthy. A petitioner and his counsel may not circumvent the abuse of the writ doctrine by failing to follow through with an investigation and then later asserting that the claim could not have succeeded earlier on the facts as then known. It will only be possible to avoid piecemeal litigation if counsel is required to make a thorough investigation of the facts at the time of petitioner's first petition for habeas corpus.[13]

C. *Ends of Justice*

Having found that McCleskey abused the writ by deliberately abandoning his *Massiah* claim, we must now decide whether the "ends of justice" require consideration of

13. We also note that in 1981 there apparently still existed records listing each prisoner's cell assignment and any visitation of prisoners by outsiders. These records, which would have corroborated or disproved Worthy's testimony, have since been destroyed.

his claim on the merits.[14] *See Sanders v. United States*, 373 U.S. at 16–19, 83 S.Ct. at 1078–79. In *Kuhlmann v. Wilson*, the Supreme Court attempted to give greater content to the open-ended "ends of justice" inquiry. Its statement, however, that "the 'ends of justice' require federal courts to entertain such petitions only where petitioner supplements his constitutional claim with a colorable showing of factual innocence," 477 U.S. at 454, 106 S.Ct. at 2627, commanded only a plurality of the justices. *See Messer v. Kemp*, 831 F.2d 946, 958 n. 19 (11th Cir.1987) (en banc), *cert. denied*, — U.S. —, 108 S.Ct. 1586, 99 L.Ed.2d 902 (1988). Thus, the circumstances under which ends of justice would require rehearing of an otherwise abusive petition remain unparticularized.

We find it unnecessary to more narrowly define the circumstances in this case. For, the instances in which ends of justice would require a rehearing of a claim do not include those in which a violation of a constitutional right would be found to constitute harmless error.[15] The members of this panel disagree as to whether the district court was correct in finding that McCleskey had established a *Massiah* violation. Pretermitting that inquiry, however, the panel is unanimous that any violation that may have occurred would constitute harmless error and that the district court erred in concluding otherwise.

D. *Harmless Error*

[10, 11] The remedy for a *Massiah* violation is not an automatic reversal of a conviction, but rather the exclusion of evidence tainted by the violation of petitioner's right to counsel. *United States v. Morrison*, 449 U.S. 361, 365, 101 S.Ct. 665, 668, 66 L.Ed.2d 564 (1981). The previous use of the tainted evidence will not result in a reversal of a conviction if it constituted "harmless error." Under the harmless error doctrine, the state must "prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *Chapman v. California*, 386 U.S. 18, 24, 87 S.Ct. 824, 828, 17 L.Ed.2d 705 (1967). *See also, Satterwhite v. Texas*, 486 U.S. 249, 108 S.Ct. 1792, 1798, 100 L.Ed.2d 284 (1988) (harmless error analysis applied to sixth amendment violation tainting evidence in sentencing phase of capital trial); *Brown v. Dugger*, 831 F.2d 1547, 1554 (11th Cir.1987).

In this case, the district court held that the error complained of could not be found harmless because Evans' testimony concerning McCleskey's incriminating statements was critical to the State's case. In reaching this conclusion, the court ignored the Eleventh Circuit's previous discussion in *McCleskey*, 753 F.2d at 884–85, of the importance of the evidence introduced through Evans' testimony at trial. Though that discussion occurred in the context of McCleskey's *Giglio* claim, it clearly has bearing on the import of Evans' testimony in the context of McCleskey's *Massiah* claim. It is true, as petitioner argues, that the harmless error inquiry in the case of a *Giglio* claim differs from the inquiry in the case of a *Massiah* violation, but this difference does not save McCleskey's claim.

The crucial question in a *Giglio* claim is whether the state's failure to disclose its promise of reward to a witness affected the judgment of the jury as to the credibility of that witness. *See Giglio*, 405 U.S. at 154, 92 S.Ct. at 766. In its previous opinion, the Eleventh Circuit held that the judgment of the jury that convicted McCleskey was not affected by the lack of disclosure. Its holding was based on two separate grounds. First, it found that "Evans' credibility was exposed to substantial impeachment even without the detective's statement and the inconsistent description of his escape," as the jury had already been made aware of Evans' extensive list of past convictions. 753 F.2d at 884. Second, and more important for our purposes, the Eleventh Circuit found that, in light of all the other evidence presented to the jury, Evans' testimony could not " 'in any reasonable likelihood have affected the judgment of the jury.' " *Id.* at 885 (quoting *Napue v. Illinois*, 360 U.S. 264, 271, 79 S.Ct. 1173, 1178, 3 L.Ed.2d 1217 (1959)). This is precisely the finding that must be made in a harmless error analysis under *Massiah* and upon reexamination, we find no reason to disturb this finding.

Evans was called by the State on rebuttal to strengthen its proof that McCleskey was the triggerman at the holdup. He testified that McCleskey had admitted to him that he had shot the policeman and that McCleskey had admitted to wearing makeup to disguise himself during the robbery. He also stated that McCleskey said he would have shot his way out even if there had been a dozen policemen.

Turning first to Evans' testimony regarding McCleskey's admission that he was the triggerman, we feel that the State has met its burden of proving, beyond a reasonable doubt, that this testimony did not contribute to the verdict. First, as noted by the en banc court, McCleskey's codefendant, Ben Wright, also testified that McCleskey was the triggerman. Though Georgia law requires corroboration of an accomplice's testimony in felony cases, it is clear that corroboration can be through circumstantial as well as direct evidence. *Davis v. State*, 178 Ga.App. 760, 344 S.E.2d 730, 732 (Ga.App.1986) (quoting *Gunter v. State*, 243 Ga. 651, 655, 256 S.E.2d 341 (Ga.1979)).

The State presented a substantial amount of circumstantial evidence. McCleskey himself confessed to his participation in the robbery. The officer was killed by the man who entered and secured the front of the store while the other three men were in the back. McCleskey was identified by two of the store personnel as the robber who came in the front door. The officer was killed by a bullet from a .38 caliber Rossi handgun. The State presented evidence that McCleskey had stolen a .38 caliber Rossi in a previous holdup. The gun that McCleskey had stolen had a white handle. The State presented testimony from an eyewitness that the robber who ran out the front door after the robbery was carrying a pearl-handled pistol. This evidence not only corroborates Ben Wright's testimony, but is of sufficient quantity to allow this court to find that any additional testimony by Evans did not contribute to the verdict.

Evans' testimony regarding McCleskey's statement that he was wearing makeup could also not have reasonably affected the jury's determination. The en banc court found that:

> Evans' testimony that McCleskey had made up his face corroborated the identification testimony of one of the eyewitnesses. Nevertheless, this evidence was not crucial to the State's case. That McCleskey was wearing makeup helps establish he was the robber who entered the furniture store through the front door. This fact had already been directly testified to by McCleskey's accomplice and two eyewitnesses as well as corroborated by McCleskey's own confession. That Evans' testimony buttresses one of the eyewitnesses' identifications is relatively unimportant.

753 F.2d at 885.

Finally, petitioner asserts that Evans' testimony as to McCleskey's statement that he would have been willing to shoot twelve policemen affected the jury's finding as to the presence of malice and increased its willingness to impose a sentence of death. Once again, we find that the en banc court's analysis of this issue demonstrates that this testimony was not crucial to the jury's finding of malice murder. The court wrote that:

> In his closing argument, however, the prosecutor presented to the jury three reasons supporting a conviction for malice murder. First, he argued that the physical evidence showed malicious intent because it indicated that McCleskey shot the police officer once in the head and a second time in the chest as he lay dying on the floor. Second, the prosecutor asserted that McCleskey had a choice, either to surrender or to kill the officer. That he chose to kill indicated malice.

14. The district court did not reach the "ends of justice" inquiry as it found that McCleskey's claim did not constitute abuse of the writ.

15. *See Messer v. Kemp*, 831 F.2d at 958–59: Because we conclude, as a matter of law, that the record in this case fails to disclose an *Ake* violation, our "ends of justice" analysis need not proceed any further. That is, we need not address any other factors relevant to the "ends of justice" in light of our conclusion that no constitutional violation occurred.

Third, the prosecutor contended that McCleskey's statement to Evans that he still would have shot his way out if there had been twelve police officers showed malice. This statement by McCleskey was not developed at length during Evans' testimony and was mentioned only in passing by the prosecutor in closing argument.

Id. at 885. In addition, the court finds no reasonable likelihood that the jury's imposition of the death penalty was affected by Evans' testimony. The prosecutor did not introduce Evans as a witness at the sentencing phase of trial, nor did he use Evans' testimony to portray McCleskey as a hardened criminal deserving of death, but concentrated instead on McCleskey's prior convictions.[16]

Because evidence other than Evans' testimony presented in the case presents such a clear indication of McCleskey's guilt, this court finds beyond a reasonable doubt that the jury would have convicted and sentenced McCleskey as it did even without Evans' testimony. Our determination that any *Massiah* error would be harmless precludes a finding that the ends of justice would require us to entertain McCleskey's claim on the merits.

CONCLUSION

The judgment of the district court granting the petition for writ of habeas corpus is reversed and the petition is hereby denied as an abuse of the writ.

REVERSED.

16. This case can easily be distinguished from *Satterwhite v. Texas*, 486 U.S. 249, 108 S.Ct. 1792, 100 L.Ed.2d 284 (1988), a case that petitioner cites as controlling. In *Satterwhite*, a psychiatrist, who had interviewed the defendant in violation of his sixth amendment rights, testified in a separate sentencing proceeding that the defendant presented a threat to society through continuing acts of violence. In finding that the constitutional error was not harmless, the Court stressed that under Texas law, a jury may not sentence a defendant to death unless it finds that the defendant would commit acts of violence and would be a threat to society. Additionally, the Court found that the psychiatrist's testimony stood out "both because of his qualifications as a medical doctor specializing in psychiatry and because of the powerful content of his message." *Id.* at ——, 108 S.Ct. at 1799. In the instant case, the jury was not instructed as to future dangerousness, and the Eleventh Circuit found, in its previous discussion of the *Giglio* violation, that Evans' testimony had already been greatly impeached by his own criminal background. 753 F.2d at 884.

James C. PEARSON, Deceased, Mildred Pearson, Personal Representative, and Mildred Pearson, Petitioners-Appellants,

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent-Appellee.

No. 88-3961
Non-Argument Calendar.

United States Court of Appeals,
Eleventh Circuit.

Dec. 11, 1989.

Personal representative of taxpayer's estate petitioned Tax Court for redetermination of IRS' deficiency decision. The Tax Court entered judgment in favor of IRS, and personal representative appealed. The Court of Appeals held that IRS does not need to mail notice of income tax deficiency to both spouses executing joint tax return, when IRS seeks to collect entire deficiency from single spouse.

Affirmed.

1. Internal Revenue ⇐4544

IRS does not need to mail notice of tax deficiency to both spouses executing joint income tax return, where IRS seeks to collect entire deficiency from single spouse. 26 U.S.C.A. § 6212(b)(2).

2. Internal Revenue ⇐4647

Tax Court did not have power to grant taxpayer's estate equitable relief from no-

APPENDIX D

United States Court of Appeals
Eleventh Circuit
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

February 6, 1990

Miguel J. Cortez
Clerk

In Replying Give Number
Of Case And Names Of Parties

MEMORANDUM TO COUNSEL OR PARTIES LISTED BELOW:

Nos. 88-8085 & 89-8085 - MCCLESKEY V. ZANT

The enclosed order has been entered on petition(s) for rehearing.

See Rule 41, Federal Rules of Appellate Procedure, and Eleventh Circuit Rule 41-1 for information regarding issuance and stay of mandate.

Sincerely,

MIGUEL J. CORTEZ, Clerk

By: Matt Davidson
Deputy Clerk

Encl.

Mary Beth Westmoreland, Esq.
Robert Stroup, Esq.
John Charles Boger, Esq.

REHG-1
7/87

IN TH UNITED STATES COURT OF AP ALS

FOR THE ELEVENTH CIRCUIT

NOS. 88-8085 & 89-8085

U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
FEB 6 1990
MIGUEL J. CORTEZ
CLERK

WARREN MCCLESKEY,

Petitioner-Appellee,

versus

WALTER ZANT, Superintendent, Georgia Diagnostic and Classification Center,

Respondent-Appellant.

Appeals from the United States District Court for the Northern District of Georgia

ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING IN BANC

(Opinion November 22, 1989, 11 Cir., 198__, ____F.2d____).

(FEB 6 1990)

Before KRAVITCH and EDMONDSON, Circuit Judges, and RONEY, Senior Circuit Judge.

PER CURIAM:

⊠ The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing in banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing In Banc are DENIED.

( ) The Petition(s) for Rehearing are DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing In Banc are also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause in banc, and a majority of the judges in active service not having voted in favor of it, Rehearing In Banc is DENIED.

ENTERED FOR THE COURT:

Phyllis Kravitch

United States Circuit Judge

APPENDIX E

United States Court of Appeals
Eleventh Circuit
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

Miguel J. Cortez
Clerk

In Replying Give Number
Of Case And Names of Parties

February 14, 1990

MEMORANDUM TO COUNSEL OR PARTIES:

RE: 88-8085 McCleskey v. Kemp
DC DKT NO.: 87-01517 CV

MANDATE STAYED TO AND INCLUDING March 23, 1990

The court has this day granted a stay of the mandate to the date shown above. If during the period of the stay there is filed in this court a Notice from the Clerk of the Supreme Court that the party who has obtained the stay has filed a petition for writ of certiorari in the Supreme Court, the stay shall continue until final disposition by the Supreme Court. Upon the filing of a copy of an order of the Supreme Court denying the petition for writ of certiorari, the mandate shall issue forthwith. See Fed.R.App.P. 41.

The Clerk of the Supreme Court has requested the clerks of the federal courts of appeal to retain the record on appeal until the Supreme Court requests that it be transmitted. Parties will be advised when this occurs. Accordingly, please refrain from routinely requesting transmittal of the record. See Supreme Court Rule 19.1.

A copy of this court's opinion (or Rule 36-1 decision), the judgment, and any order on rehearing should be attached as an appendix to any petition for writ of certiorari (or jurisdictional statement) filed. See Supreme Court Rules 21(k), 15(j).

Sincerely,

MIGUEL J. CORTEZ, Clerk

Reply To: Matt Davidson (404) 331-2904

Consolidated with No. 89-8085

MDT-2 (7/87)

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
FEB 14 1990
MIGUEL J. CORTEZ
CLERK

NOS. 88-8085 &
89-8085

WARREN MCCLESKEY,

Petitioner-Appellee,

versus

WALTER ZANT, Superintendent, Georgia
Diagnostic and Classification Center,

Respondent-Appellant.

Appeals from the United States District Court for the
Northern District of Georgia

ORDER:

( ) The motion of Appellee, Warren McCleskey,
for (X) stay ( ) recall and stay of the issuance of the mandate
pending petition for writ of certiorari is DENIED.

(X) The motion of Appellee, Warren McCleskey,
for (X) stay ( ) recall and stay of the issuance of the mandate
pending petition for writ of certiorari is GRANTED to and including
March 23, 1990, the stay to continue in force until the final
disposition of the case by the Supreme Court, provided that within
the period above mentioned there shall be filed with the Clerk of
this Court the certificate of the Clerk of the Supreme Court that the
certiorari petition has been filed. The Clerk shall issue the
mandate upon the filing of a copy of an order of the Supreme Court
denying the writ, or upon expiration of the stay granted herein
unless the above mentioned certificate shall be filed with the Clerk
of this Court within that time.

( ) The motion of _____
for a further stay of the issuance of the mandate is GRANTED to and
including _____, under the same conditions as set
forth in the preceding paragraph.

( ) IT IS ORDERED that the motion of _____
for a further stay of the issuance of the mandate is DENIED.

Phyllis Kravitch
UNITED STATES CIRCUIT JUDGE

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